INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/10/23 - Annulment Proceedings

TECO GUATEMALA HOLDINGS LLC

v.

REPUBLIC OF GUATEMALA

REPUBLIC OF GUATEMALA'S REPLY ON ANNULMENT

8 May 2015

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I. INTRODUCTION AND SUMMARY

1. The Republic of Guatemala (***Guatemala***) submits this Reply on Annulment (***Reply***),[1] pursuant to Procedural Order No. 1 dated 1 August 2014. This Reply responds to TGH's Counter-Memorial on Annulment of the Award (***Counter-Memorial on Annulment*** or ***TGH's Counter-Memorial***) dated 9 February 2015, and supports Guatemala's Application on Annulment and its Memorial on Annulment, dated 18 April and 17 October 2014, respectively.

2. As explained in Guatemala's Memorial on Annulment, Guatemala is seeking total or, alternatively, partial annulment of the Award issued by the Tribunal in the Arbitration due to manifest deficiencies in the Award. TGH's Counter-Memorial on Annulment fails to rebut any of those deficiencies, but rather confirms them as will be explained below.

3. After a brief summary of Guatemala's position at Sections A to C immediately below, this Reply follows the following structure:

   - Section II summarises the dispute submitted to the original Arbitration and the Award, correcting TGH's mischaracterizations;
   - Section III addresses the Tribunal's manifest excess of powers;
   - Section IV examines the Award's failure to state the reasons on which it is based;
   - Section V analyzes the Tribunal's serious departure from a fundamental rule of procedure; and
   - finally, Section VI contains Guatemala's request for relief.

A. THE TRIBUNAL CONFLATED A TREATY AND A DOMESTIC LAW BREACH, INCURRING IN MANIFEST EXCESS OF POWERS AND FAILURE TO STATE REASONS

4. Guatemala was found to be in breach of the Treaty for what was, as evidenced in the Tribunal's own reasoning, a mere infringement of domestic law. However, an infringement of domestic law cannot be automatically equated to a breach of an

[1] Capitalized terms not defined specifically in this document correspond to defined terms in Guatemala's Memorial on Annulment dated 17 October 2014.

investment protection treaty; "something more" is required.[2] The Tribunal did not respect this basic and fundamental principle of international law. Further, it effectively reversed the prior findings of the Guatemalan Constitutional Court which had dismissed the alleged domestic law breach. Yet it is well established that investment treaty tribunals are not appeal courts on local law matters. These serious shortcomings permeate the entire Award.

1. The flawed decision on jurisdiction

5. First, the Tribunal wrongly asserted jurisdiction on TGH's claims. It did so without even addressing Guatemala's objection to jurisdiction in any meaningful way.

6. Guatemala argued that the Tribunal did not have jurisdiction *ratione materiae* under the CAFTA-DR because the Treaty conferred jurisdiction on genuine Treaty claims and not on mere domestic law claims. When faced with this sort of issue, the "jurisdictional analysis must be made carefully, […] taking into account the respective treaty or instrument of expression of consent and without any presumption for or against ICSID jurisdiction […]."[3] In particular, a tribunal must "assess whether the facts alleged […] are capable, if proved, of constituting breaches of the obligations […]" invoked,[4] i.e., here the Treaty. This is the so-called *prima facie* test. In applying this test, "the tribunal must objectively characterise [the] facts in order to determine finally whether or not they fall within the scope of the parties' consent […]. [T]he tribunal may not simply adopt the claimant's characterisation without examination."[5]

7. Here the Tribunal failed in all respects. It did not examine the Treaty provision establishing the scope of consent, and it did not apply the *prima facie* test either. TGH's Counter-Memorial confirms this. TGH agrees that the Treaty establishes the

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[2] *ADF Group Inc v. United States of America* (ICSID Case No. ARB(AF)/00/1) Award, 9 January 2003, **Exhibit CL-4,** para. 190.

[3] *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, 17 August 2012, **Exhibit RL-32**, para. 303.

[4] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Decision on Jurisdiction, 14 November 2005, **Exhibit RL-75**, para. 197.

[5] *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru* (ICSID Case No. ARB/03/28) Decision on Annulment, 1 March 2011, **Exhibit RL-57**, para. 118.

jurisdictional limitation *ratione materiae* identified by Guatemala,[6] and that the Tribunal was bound to apply a *prima facie* test. TGH contends that the Tribunal applied the test when it held: "the Claimant has made allegations that are such, if proved, as to establish a breach of Guatemala's obligations under the minimum standard."[7] But this proves Guatemala's case: the question is not what TGH had "alleged," but rather whether the facts supported, even *prima facie*, those allegations.

8. The Tribunal did not conduct the required analysis and simply accepted the characterization of the claims as put forward by TGH. This nullified the jurisdictional limitation contained in the Treaty. Thus, the Tribunal manifestly exceeded its powers in wrongly affirming its jurisdiction over a purely domestic law claim, and failed to state reasons for rejecting Guatemala's objection, both of which are grounds for the total annulment of the Award.

2. The reversal of the Constitutional Court decisions

9. There is consistent case law affirming that investment treaty tribunals "cannot substitute their own application and interpretation of national law to the application by national courts,"[8] and the Tribunal itself recognized that "this Tribunal's task is not and cannot be to review the findings made by the courts of Guatemala under Guatemalan law."[9]

10. The Tribunal did not adhere to this principle and self-imposed limitation, as already explained in Guatemala's Memorial on Annulment.[10] TGH's defence again confirms Guatemala's position. TGH seeks to distinguish the Award from the Constitutional Court judgment, but in fact pinpoints the overlap between the two decisions.[11]

11. As stated above, the Tribunal found Guatemala to be in breach of the Treaty for what it considered was an infringement of domestic law by the Guatemalan electricity regulator,

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[6] TGH's Counter-Memorial on Annulment, paras. 28, 53.

[7] Award, para. 464. TGH's Counter-Memorial on Annulment, para. 56 quoting this paragraph.

[8] *Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23) Award, 8 April 2013, **Exhibit RL-46**, para. 441. *See also Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* Decision, 10 November 2010, **Exhibit RL-15**, para. 70.

[9] Award, para. 477.

[10] Guatemala's Memorial on Annulment, paras. 118, 209.

[11] TGH's Counter-Memorial on Annulment, paras. 90, 94, 100.

the CNEE. Specifically, the Tribunal took issue with CNEE Resolution 144-2008, which concluded the process for the revision of the electricity tariffs of EEGSA, a Guatemalan electricity distribution company, in 2008. The Tribunal found that "Resolution No. 144-2008 is inconsistent with the regulatory framework,"[12] and that "in adopting Resolution No. 144–2008, […] the CNEE acted arbitrarily and in violation of fundamental principles of due process in regulatory matters."[13]

12. However, the consistency of Resolution 144-2008 with the electricity Regulatory Framework in Guatemala had already been addressed by the Guatemalan Constitutional Court. Particularly in its 18 November 2009 decision, the Court upheld the legality of the Resolution.[14] The Tribunal acknowledged this in the Award: "[I]n a majority decision dated November 18, 2009, the Constitutional Court reversed the judgment of the second civil court of first instance, thus putting an end to the judicial proceedings against Resolution No. 144-2008."[15]

13. Thus, in finding Guatemala liable on the basis that Resolution 144-2008 breached the Regulatory Framework, the Tribunal overturned the Constitutional Court's decisions. It did so contradicting the international law principle, and its earlier finding, that it could and would not review the local court decisions that had upheld the conduct of the regulator. This is another manifest excess of powers and failure to state reasons. Both grounds require annulment of the totality of the Award.

3. The failure to apply international law and instead equating a breach of domestic law to a breach of the Treaty

14. The Tribunal based its merits decision on the supposed "willful disregard of the […] regulatory framework" by the electricity regulator which it characterized as arbitrary and lacking due process.[16] However, there is no international law analysis of the concepts of arbitrary conduct or due process, or of how a State measure can constitute either of them,

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[12] Award, para. 681.

[13] *Ibid.*, para. 664.

[14] Judgment of the Constitutional Court of 18 November 2009, **Exhibit R-105**, pgs. 23-25, 29-33; Judgment of the Constitutional Court of 24 February 2010, **Exhibit R-110**, pgs. 31-34.

[15] Award, para. 233.

[16] *Ibid.*, para. 465. *See also Ibid.*, paras. 481, 489, 492-493, 587, 619, 621, 664, 681, 688, 691, 711.

in light of the facts of this case. Instead, the Award focused almost entirely on Guatemalan law. A "willful disregard of the fundamental principles upon which the regulatory framework is based," as the Tribunal put it,[17] is simply an indirect way of referring to a breach of the Regulatory Framework. Having found that the regulator acted contrary to the Regulatory Framework, the Tribunal makes an unsubstantiated jump that Guatemala breached the Treaty.[18] The international law analysis is missing.

15. TGH's response also confirms this. TGH agrees that the applicable law was international law but is unable to find a paragraph in the Award where the Tribunal examines international law in any depth or applies that law to the facts.[19]

16. Failure to apply the applicable law is a classic instance of manifest excess of powers.[20] It is also a serious failure to state reasons, because there is an obvious lack of motivation for the finding of a breach of the Treaty (as opposed to a breach of domestic law).[21] The Award should thus be totally annulled also for these reasons.

B. THE TRIBUNAL FAILED TO STATE REASONS AND SERIOUSLY DEPARTED FROM A FUNDAMENTAL RULE OF PROCEDURE IN DETERMINING COMPENSATION

17. The dispute before the Tribunal, as framed by TGH, concerned essentially whether the Guatemalan electricity regulator had acted properly under Guatemalan law in deciding in 2008 how to establish the electricity tariffs for a Guatemalan electricity distribution

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[17] *Ibid.*, para. 458.

[18] Award, paras. 681-682, 690, 711.

[19] TGH's Counter-Memorial on Annulment, paras. 74-85. TGH quotes paras. 448, 454-458, 587, 664, 682, 683, 690, 710-711, of the Award claiming that "the Tribunal applied international law to the facts presented." However in such paragraphs, the Tribunal conducts a general analysis of the minimum standard, and says that it prohibits conduct lacking in due process, as well as the arbitrary conduct of the CNEE. However, the Tribunal does not define the scope of those concepts and does not apply them to the facts, i.e., it does not explain why the conduct of the CNEE amounts to arbitrariness and lack of due process (beyond being a breach of the Regulatory Framework).

[20] *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4) Decision on Annulment, 14 December 1989, **Exhibit RL-47**, para. 5.03; *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8) Decision on Annulment, 25 September 2007, **Exhibit RL-54**, para. 49; *MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7) Decision on Annulment, 21 March 2007, **Exhibit RL-55**, para. 44. *See also* paras. 52-53.

[21] *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7) Decision on Annulment, 5 June 2007, **Exhibit RL-56**, paras. 122-123, 126, 133; *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4) Decision on Annulment, 14 December 1989, **Exhibit RL-47**, para. 5.08; *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14) Decision on Annulment 29 June 2005, **Exhibit RL-58**, para. 70. *See also* Section IV.B.

company for the forthcoming five year period. In particular, the question was whether the regulator was bound by the conclusions of an expert commission's report and a technical study, the Bates White study, presented by the company to calculate the tariffs.

18. The Tribunal found that Guatemala acted in breach of the Treaty, in failing to follow the Expert Commission's report and the Bates White study. However, the breach occurred because the electricity regulator did not provide sufficient motivation for its decision not to follow the Expert Commission's report and the Bates White study, not for the decision itself.[22] In other words, the Tribunal did not find Guatemala liable because the Expert Commission's report and the study were binding. On the contrary, the Tribunal was clear throughout the liability section of the Award that neither the report nor the study were binding, and that the breach related to the regulator's failure to provide reasons for not implementing them.[23] As the Tribunal noted: "[t]his is of course not to say that the distributor's study is binding upon the regulator;"[24] and "the conclusions of the Expert Commission were not binding."[25]

19. However, when computing the "historical losses" caused by Guatemala's Treaty breach, the Tribunal ignored its own conclusion that the Expert Commission's report and Bates White study were not binding. The Tribunal calculated damages on the basis of the difference between the tariff approved by the regulator and that which would have applied if the Expert Commission's report and Bates White study were indeed binding. In other words, Guatemala was condemned to pay for damages that were not caused by the supposedly unlawful act.

20. TGH's response is that the Tribunal did make a finding that the Bates White study and the Expert Commission's report were binding.[26] According to TGH,[27] this finding is at paragraph 731 of the Award where the Tribunal held that "[t]he Respondent [did not] establish that the regulator would have had any valid reasons to disregard the

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22 Award, paras. 583, 683.

23 *Ibid.*, paras. 565, 582-583, 588, 664, 681.

24 *Ibid.*, para. 531.

25 *Ibid.*, para. 565.

26 TGH's Counter-Memorial on Annulment, paras. 82, 97-99.

27 *Ibid.*, paras. 106, 111, 114-116.

pronouncements of the Expert Commission […]" and that "the Arbitral Tribunal is not convinced that […] there is any reason to depart from […]" the Bates White study and the Expert Commission's report.[28] However, this paragraph belongs to the section of the Award on damages, and illustrates precisely the contradiction in the Award since it is entirely inconsistent with the earlier conclusion on the merits.

21. This is a major contradiction and an unexplained leap in logic in the Award which amounts to another failure by the Tribunal to state reasons. It thus requires the annulment of the section of the Award on historical damages granted to TGH as compensation.

22. The Tribunal also ignored crucial expert evidence presented by Guatemala in the Arbitration calculating the alleged historical damages on the same basis as the Bates White study. However, whilst the Tribunal based its calculation directly on the Bates White study, it wholly excluded Guatemala's expert evidence in response, affirming, without explanation, that the Tribunal "cannot usefully refer to it as a basis for the but for scenario."[29] The Tribunal apparently failed to review the file properly and take Guatemala's evidence into consideration.[30] This is a breach of fundamental tenets of due process and a serious departure from a fundamental rule of procedure which also requires the annulment of the section of the Award on the historical damages.

C. THE TRIBUNAL FAILED TO STATE REASONS FOR ITS DECISION ON COSTS

23. The Tribunal condemned Guatemala to pay 75 per cent of TGH's costs amounting to US$7,520,695.39,[31] one of the highest costs awards ever made against a respondent state in ICSID history. It did so after affirming, without any analysis or demonstration, that TGH's costs were "justified" and "appropriate" and that it was applying the principle that costs follow the event.[32] Yet TGH did not win 75 per cent of the arguments or 75 per cent of its claimed damages. It lost the vast majority of its arguments[33] and recovered just 10

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28 Award, para. 731.

29 *Ibid.*, para. 727.

30 Memorial on Objections to Jurisdiction and Counter-Memorial, para. 618. *See also*, Respondent's Post-Hearing Brief, paras. 334-335.

31 Award, para. 780.

32 *Ibid.*, paras. 775, 777.

33 *See* paras. 35-36, 163.

per cent of its claimed amounts. The "event" here, if any, was a tie which is ably demonstrated by the fact that both Parties are seeking annulment of different parts of the Award. TGH does not consider itself a "winner" and yet has been awarded costs as if it had walked away with at least a US$200 million award.

24. But before the allocation of costs is considered, the Tribunal was under an obligation to provide a minimum motivation for its unsupported conclusion that TGH's costs of more than US$10 million were "justified" and "appropriate" for an arbitration that lasted a record of only 2.5 years, and where there was no bifurcation of proceedings. Not one cent was deducted for inappropriateness. It is noteworthy that Guatemala was equally represented by international counsel and local counsel and had an equal burden in the case, yet submitted costs of just over US$5 million.[34] No attempt was made by the Tribunal to consider reasonableness by looking at the comparative costs of each Party.

25. The absence of any reasoning in the Tribunal's decision on costs is a clear failure to state reasons and thus should be annulled.

II. THE DISPUTE AND THE AWARD

26. In its Counter-Memorial on Annulment, TGH mischaracterizes the dispute and the Tribunal's Award. For example, TGH reiterates many of the arguments it raised during the Arbitration, including its claims regarding legitimate expectations, breach of "prior representations" by Guatemala, its allegations of "fundamental changes to the regulatory framework," and its contentions that the CNEE "manipulate[d]" "from the beginning" the tariff review.[35] However, nowhere in its description of the Award does TGH mention the critical fact that the Tribunal considered and plainly rejected all these claims. TGH insists on asserting these accusations in order to give the false impression that this was more than a dispute regarding the correct interpretation and application of a domestic Regulatory Framework. TGH's attempt, however, is unavailing.

27. Further, TGH fails to mention that the Tribunal held Guatemala liable solely because the CNEE failed to *provide reasons* for its decisions to reject the Bates White study and not

[34] Award, para. 774.

[35] TGH's Counter-Memorial, paras. 4, 16, 19, 24, 30.

to implement the Expert Commission's report, not because of any decisions taken. This omission is unjustifiable, given that the Tribunal repeatedly pointed to the CNEE's lack of reasons as the basis for its Award.[36]

28. In order to correct TGH's mischaracterizations, the following sections provide a brief and objective description of the Award, and the key issues of the underlying dispute.

A. OUTLINE OF THE DISPUTE

29. As explained in the Memorial on Annulment,[37] the dispute at issue in the Arbitration related to the electricity tariff review process in Guatemala in 2008. During that process, certain discrepancies arose between the regulator of the electricity sector in Guatemala (the ***CNEE***), and an electricity distributor in which TGH was a shareholder (***EEGSA***). Essentially, EEGSA disagreed with the manner in which the CNEE interpreted certain aspects of the procedure for the review of electricity tariffs in Guatemala, which takes place every five years.

30. The following is a summary of the facts, which are laid out in detail in the Memorial on Annulment:[38]

- At the start of the tariff review, the CNEE adopted terms of reference, which establish the "methodology for determination of the tariffs."[39]
- EEGSA commissioned the consulting firm Bates White to conduct its tariff study, which was to comply with the terms of reference, and presented its study in March 2008.
- The CNEE reviewed the tariff study, found that it contained numerous irregularities, and requested that Bates White make the necessary corrections to comply with the terms of reference.[40]
- Despite its obligation to incorporate corrections from the CNEE,[41] Bates White failed to do so in the subsequent versions of its tariff study.[42]

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[36] Award, paras. 545, 561, 562, 564, 565, 576, 582, 583, 584, 585, 586, 587, 588, 633, 664, 670, 678, 683, 700, 708.

[37] Guatemala's Memorial on Annulment, paras. 31-49.

[38] *Ibid.*, paras. 31-49.

[39] LGE, **Exhibit R-8**, art. 77. *See also Ibid.*, art. 4(c).

[40] Guatemala's Memorial on Annulment, paras. 39-40. *See also* Memorial on Objections and Counter-Memorial, paras. 330-335.

- In light of their disagreements, and in accordance with the regulation,[43] the Parties agreed to form an expert commission to issue a pronouncement.[44]

- That Expert Commission reviewed each issue, and issued a report in favor of the CNEE with regard to more than half of the discrepancies.[45]

- Having received the positive pronouncements, the CNEE dissolved the Expert Commission[46] and issued Resolution 144-2008 concluding the review process.[47]

- Since the Expert Commission confirmed the deficiencies in the Bates White study,[48] through Resolution 144-2008 the CNEE set tariffs based on a study prepared by the independent and pre-qualified consulting firm Sigla.[49]

- EEGSA challenged Resolution 144-2008, and proceedings went up to the highest court in Guatemala, the Constitutional Court, which issued two decisions upholding the legality of the CNEE's conduct during the tariff review process.[50]

B. THE AWARD

31. In the Arbitration, TGH sought to dress its claims as claims for breach of its legitimate expectations, as well as for fundamental changes to the Regulatory Framework.[51] TGH did so in order to portray its claim as a classic fair and equitable treatment case under an investment treaty, and not just the domestic law dispute that EEGSA had already brought before the Guatemalan courts.

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41 RLGE, **Exhibit R-36**, art. 98.

42 Guatemala's Memorial on Annulment, paras. 41-42.

43 LGE, **Exhibit R-8**, art. 75.

44 Memorial on Objections and Counter-Memorial, paras. 351-352.

45 *Ibid.*, paras. 390, 416; Rejoinder, para. 440; Respondent's Post-Hearing Brief, para. 176.

46 Memorial on Objections and Counter-Memorial, paras. 411-414; and CNEE Resolution GJ-Providencia-3121 (File GTTE-28-2008), 25 July 2008, **Exhibit R-86.**

47 Memorial on Objections and Counter-Memorial, paras. 415-420; and CNEE Resolution 144-2008, 29 July 2008, **Exhibit R-95**.

48 Memorial on Objections and Counter-Memorial, para. 417.

49 *Ibid.*, paras. 415-420.

50 Guatemala's Memorial on Annulment, paras. 46-49; Judgment of the Constitutional Court, 18 November 2009, **Exhibit R-105**; Judgment of the Constitutional Court, 24 February 2010, **Exhibit R-110**.

51 TGH's memorials were essentially based on these concepts. Claimant's Memorial, Sections II.B, II.C, II.E, II.F, III.A, III.B, III.C; Reply, Sections II.A.2, II.B, II.E, III.A; Claimant's Post-Hearing Brief, Sections II.A.1, II.A.2, III.A, III.B, III.C; Claimant's Post-Hearing Brief Reply, Sections IV.A, IV.B.1, IV.B.2.

32. However, the Tribunal identified the dispute as a domestic one relating to the CNEE's compliance with the Regulatory Framework:

> The question here is whether the regulatory framework permitted the regulator, in the circumstances of the case, to disregard the distributor's study and apply its own. The Parties are in disagreement in this regard.[52] (Emphasis added.)

33. Further, in the Award the Tribunal recognized that it could not review the decisions of the Constitutional Court, holding that "[t]his Tribunal's task is not and cannot be to review the findings made by the courts of Guatemala under Guatemalan law."[53]

34. In spite of this, the Tribunal affirmed its jurisdiction *ratione materiae* as follows:

> The Arbitral Tribunal considers that the Claimant has made allegations that are such, if proved, as to establish a breach of Guatemala's obligations under the minimum standard […].[54]

35. Regarding the merits, the Tribunal rejected all but one of TGH's claims, and held instead that:

- "the Arbitral Tribunal is not convinced that […] the regulator acted improperly."[55]
- TGH's argument that the Government fundamentally altered the Regulatory Framework "is ill-grounded."[56]
- The case did not involve classic legitimate expectations that could be protected by an investment treaty, but rather concerned only the CNEE's compliance with the Regulatory Framework.[57]

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52 Award, para. 534. *See also Ibid.*, paras. 79, 497.

53 *Ibid.*, para. 477. *See also Ibid.*, para. 474.

54 *Ibid.*, para. 464.

55 *Ibid.*, para. 652. *See also Ibid.*, paras. 644, 650. Likewise, the Tribunal dismissed the claims that the CNEE manipulated the terms of reference (Award, paras. 639-643), did not cooperate in the tariff review process (Award, para. 644), and had breached its agreement with EEGSA to delegate power to the Expert Commission (Award, paras. 649-650). It also found that the CNEE did not try to unduly influence the Expert Commission (Award, paras. 645-652) and had not engaged in any kind of reprisals against EEGSA (Award, paras. 712-715).

56 Award, para. 629. *See also Ibid.*, para. 638.

57 In the words of the Tribunal, "[t]he legitimate expectations upon which the Claimant relies are […] that the relevant applicable legal framework will not be disregarded […]" and such "expectations" are "irrelevant to the assessment of whether a State should be held liable […]." Award, paras. 620-621.

- The CNEE and Guatemala, generally speaking, held a correct interpretation of the regulatory framework.[58]

36. TGH, however, seeks to resuscitate, in the annulment phase, arguments that were rejected by the Tribunal such as breach of "prior representations" by Guatemala, as well as "fundamental changes to the regulatory framework,"[59] often misleadingly prefacing them with the expression "as TECO demonstrated" in the Arbitration.[60] TGH also repeats its failed argument that Guatemala sought to "manipulate and to control" the tariff review.[61] TGH's arguments failed on the merits, and cannot form the basis for its response to Guatemala's annulment application.[62]

37. The Tribunal's decision that Guatemala breached the Treaty's international minimum standard of fair and equitable treatment was based exclusively on CNEE Resolution 144-2008:[63]

> The Arbitral Tribunal therefore concludes that Resolution No. 144-2008 is inconsistent with the regulatory framework. By rejecting the distributor's study […] with no regard and no reference to the conclusions of the Expert Commission, the CNEE acted arbitrarily and in breach of the administrative process established for the tariff review.
>
> In the Arbitral Tribunal's view, both the regulatory framework and the minimum standard of treatment in international law obliged the CNEE to act in a manner that was consistent with the fundamental principles on the tariff review process in Guatemalan law.[64] (Emphasis added.)

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58 For example, it rejected the argument that the CNEE was unauthorized to dissolve the Expert Commission once it had issued its report (Award, paras. 653-657), and also accepted Guatemala's argument that the report of the Expert Commission was not binding but advisory (Award, paras. 565, 670).

59 TGH's Counter-Memorial on Annulment, para. 30. *See also Ibid.,* para. 4.

60 *Ibid.*, paras. 4, 11, 18, 19, 53, 59, 62. *See also Ibid.*, paras. 22, 25.

61 *Compare* TGH's Counter-Memorial on Annulment, para. 19 *with* Award, heading to Section (b), p. 125 (regarding "alleged manipulations of the Terms of Reference by the CNEE and the alleged lack of cooperation of the CNEE in the tariff review process.").

62 Award, paras. 618, 621, 624-638.

63 CNEE Resolution 144-2008, 29 July 2008, **Exhibit R-95.**

64 Award, paras. 681-682.

38. It is noteworthy that Resolution 144-2008 was the very regulatory measure challenged by EEGSA before the Guatemalan courts, and which had been upheld by the Constitutional Court in its decision of 18 November 2009.[65]

39. In particular the Tribunal held that the Bates White tariff study and the Expert Commission's report were not binding, for example when holding: "[t]his is of course not to say that the distributor's study is binding upon the regulator;"[66] or "the conclusions of the Expert Commission were not binding."[67] However, the CNEE failed to provide reasons for its decision in Resolution 144-2008 to reject the Bates White tariff study, and when it considered that it was not bound to implement the Expert Commission's report, and could instead set tariffs on the basis of the Sigla study:

> In the Arbitral Tribunal's view, in adopting Resolution No. 144-2008, in disregarding without providing reasons the Expert Commission's report, and in unilaterally imposing a tariff based on its own consultant's VAD calculation, the CNEE acted arbitrarily and in violation of fundamental principles of due process in regulatory matters.[68] (Emphasis added.)

40. However, on the alleged "historical losses" the Tribunal held as follows:

> The amount of such losses must be quantified […] on the basis of what the tariffs should have been had the CNEE complied with the regulatory framework […] such assessment is properly made on the basis of the Bates White's July 28, 2008 study.[69]

41. Thus the decision on damages is predicated on the CNEE's obligation to endorse the Bates White study and the Expert Commission's report, while the decision on liability is based on the opposite premise, i.e., that neither the study nor the report were binding, but that the CNEE should have provided reasons for its rejection.

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65 Judgment of the Constitutional Court, 18 November 2009, **Exhibit R-105**, pgs. 23-25, 29-33; Judgment of the Constitutional Court, 24 February 2010, **Exhibit R-110**, pgs. 28-36.

66 Award, para. 531.

67 *Ibid.*, para. 565.

68 *Ibid.*, para. 664.

69 *Ibid.*, para. 742, referred to in TGH's Counter-Memorial on Annulment, para. 27, to justify the Tribunal's decision on damages.

III. THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS

42. As explained in Guatemala's Memorial on Annulment,[70] it is a well-established principle that the annulment mechanism provided for in article 52 of the ICSID Convention is a limited recourse.[71] However, this does not establish an absolute bar to annulment when an award contains serious deficiencies. As held by the Committee in *MINE v Guinea*:

> Article 52(1) should be interpreted in accordance with its object and purpose, which excludes on the one hand, as already stated, extending its application to the review of an award on the merits and, on the other, an unwarranted refusal to give full effect to it within the limited but important area for which it was intended.[72]

43. In particular, annulment is required in "unusual and important cases,"[73] and "where there has been a manifest and substantial breach of a number of essential principles set out in […] Article [52]."[74] This is the case here, where the Award contains a number of serious shortcomings that permeate its entire structure, and which amount to a series of breaches of the principles provided in article 52.

44. The first article 52 ground for annulment relevant to the present case is that of manifest excess of powers. A manifest excess of powers occurs when an arbitral tribunal exceeds the limits of the jurisdiction it has been granted.[75] As explained in Professor Schreuer's

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[70] Guatemala's Memorial on Annulment, paras. 67-74.

[71] *See*, for instance, *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No ARB/07/17) Decision on Annulment, 24 January 2014, **Exhibit RL-116**, para. 119. *See also* CH Schreuer, "Three Generations of ICSID Annulment Proceedings" in: E Gaillard & Y Banifatemi (eds), Annulment of ICSID Awards (2004) 17, **Exhibit RL-131**, p. 42.

[72] *Maritime International Nominees Establishment (MINE) v. Government of Guinea* (ICSID Case No ARB/84/4) Decision on Annulment, 14 December 1989, **Exhibit RL-47**, para. 4.05.

[73] *CDC Group plc v. Republic of the Seychelles* (ICSID Case No. ARB/02/14) Decision on Annulment, 29 June 2005, **Exhibit RL-58**, para. 34.

[74] *Consortium R.F.C.C. v. Kingdom of Morocco* (ICSID Case No. ARB/00/6) Decision on Annulment, 18 January 2006, **Exhibit RL-78**, para. 223. In its original French language it reads:

> [D]ans des hypothèses de violation manifeste et substantielle d'un certain nombre de principes fondamentaux, énoncés par cet article [52].

[75] *E.g.*, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on Annulment, 3 July 2002, **Exhibit RL-50**, para. 86; *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7) Decision on Annulment, 5 June 2007, **Exhibit RL-56**, paras. 41-44; *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12) Decision on Annulment, 1 September 2009, **Exhibit RL-59**, para. 45.

commentary: "[t]he most important form of excess of powers occurs when a tribunal exceeds the limits of its jurisdiction [...]."[76] Guatemala provided ample authoritative support for this principle in its Memorial on Annulment.[77]

45. In spite of this, TGH argues that, *first*, Guatemala relies only on "secondary sources," which is incorrect since Guatemala cited abundant case law,[78] and *second*, that there is no "heightened level of scrutiny" with regard to decisions of jurisdiction.[79] To the extent that this suggests that incorrect decisions on jurisdiction can survive annulment, this is also untrue.

46. For example, TGH relies on the annulment decision in *Soufraki v UAE*, but the *ad hoc* committee in that case underlined precisely that if a tribunal goes beyond its jurisdiction, including *ratione materiae*, by definition it incurs in a manifest excess of powers:

> Firstly, it can be said that there is an excess of power if a tribunal acts "too much." There is, in principle, an excess of power if a tribunal goes beyond its jurisdiction *ratione personae*, or *ratione materiae* or *ratione voluntatis*. There is an excess of power if the tribunal:
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> - asserts its jurisdiction over a person or a State in regard to whom it does not have jurisdiction;
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> - asserts its jurisdiction over a subject-matter which does not fall within the ambit of the jurisdiction of the tribunal;
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> - asserts its jurisdiction over an issue that is not encompassed in the consent of the Parties.[80]

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76 C Schreuer *et al.*, *The ICSID Convention, A Commentary*, 2nd ed, (2009), art. 52, p. 938, **Exhibit RL-40**, para. 133.

77 Guatemala's Memorial on Annulment, paras. 77-83.

78 *Ibid.*, paras. 78-81 (quoting *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19) Decision on Annulment, 14 June 2010, **Exhibit RL-65**, para. 46; *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7) Decision on Annulment, 5 June 2007, **Exhibit RL-56**, para. 42; *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14) Decision on Annulment, 29 June 2005, **Exhibit RL-58**, para. 40).

79 TGH's Counter-Memorial on Annulment, paras. 41-45.

80 *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7) Decision on Annulment, 5 June 2007, **Exhibit RL-56**, para. 42.

47. TGH also relies on *MCI v Ecuador*.[81] However, the committee in that case stated that "[a] decision that there is no jurisdiction may result in a manifest excess of powers when the Tribunal has acted outside the proper bounds of its competence."[82] The same applies to decisions that wrongly assert jurisdiction.

48. In the words of the annulment committee in *CDC Group v Seychelles*: "a Tribunal's legitimate exercise of power is tied to the consent of the parties, and so it exceeds its powers where it acts in contravention of that consent (or without their consent, *i.e.*, absent jurisdiction)."[83]

49. Similarly, in *Klöckner I* the committee held as follows: "[c]learly, an arbitral tribunal's lack of jurisdiction, whether said to be partial or total, necessarily comes within the scope of an 'excess of powers' under Article 52 (1)(b)."[84]

50. The recent annulment decision in *Tza Yap Shum v Peru* made the same point:

> The Committee agrees with the Republic of Peru in that, given that the jurisdiction of an arbitral tribunal is based on the parties' consent, <u>to ignore the terms of the agreement by the parties in the manner in which it has been expressed in the arbitral clause constitutes an excess of powers. More generally, an excess of powers occurs whenever the powers exercised by the arbitrators are not those that were granted to them</u>. It thus follows that an arbitral tribunal usurps its powers when it attributes to the parties agreements and declarations that they have not made.[85] (Emphasis added.)

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81 TGH's Counter-Memorial on Annulment, para. 44.

82 *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/03/6) Decision on Annulment, 19 October 2009, **Exhibit RL-62**, para. 56.

83 *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14) Decision on Annulment, 29 June 2005, **Exhibit RL-58**, para. 40.

84 *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2) Decision on Annulment, 3 May 1985, **Exhibit RL-49**, para. 4.

85 *Señor Tza Yap Shum v. The Republic of Peru* (ICSID Case No. ARB/07/6) Decision on Annulment, 12 February 2015, **Exhibit RL-132**, para. 76. Unofficial English translation. In its original Spanish language it reads:

> El Comité está de acuerdo con la República del Perú en que, puesto que la jurisdicción de un tribunal de arbitraje se apoya en el consentimiento de las partes, ignorar los términos del acuerdo de las partes del modo en que está expresado en la cláusula arbitral constituye una extralimitación de facultades. Más generalmente, una extralimitación en las facultades tiene

51. Distinguished scholars agree with this view, explaining that "the ground of manifest excess of powers […] allows the *ad hoc* committee full control over the findings of the arbitral tribunal,"[86] and that "the requirement of manifestness appears inapposite in the context of jurisdiction […] any exercise of jurisdictional power without proper jurisdiction is a manifest excess of power."[87] This is because "[j]urisdiction is obviously something pretty fundamental" and therefore excess of powers is not "the same as the other possible grounds for annulment."[88] This also applies to the reasoning of decisions on jurisdiction, which should be particularly elaborate because, in the words of the distinguished scholar Professor Pierre Lalive, "the decision to assume jurisdiction when the latter is denied by the State is of such capital importance that it must be fully reasoned and justified."[89]

52. Further, an excess of powers occurs when a tribunal fails to apply the law governing the dispute.[90] TGH does not seem to dispute this, since its Counter-Memorial does not

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> lugar toda vez que las facultades ejercidas por los árbitros no son aquellas que les fueron otorgadas. De ello se desprende que un tribunal de arbitraje usurpa sus facultades cuando le atribuye a las partes acuerdos y declaraciones que estas no han hecho.

[86] P Pinsolle, "Jurisdictional Review of ICSID Awards", presentation, British Institute of International and Comparative Law (BIICL), 7 May 2004, **Exhibit RL-66**, p. 7.

[87] G Kaufmann-Kohler, "Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences?" in: (E Gaillard and Y Banitafemi (eds), *Annulment of ICSID Awards* (2004) 189, **Exhibit RL-67**, pgs. 198-199. *See also* P Pinsolle, "Jurisdictional review of ICSID Awards" (2004) 5(4) Journal of World Investment and Trade 613, **Exhibit RL-68**, p. 616 ("One cannot be half-right or half-wrong when it comes to jurisdictional issues."); F Berman, "Review of the Arbitral Tribunal's Jurisdiction in ICSID Arbitration" in: E Gaillard (ed), *The Review of International Arbitral Awards* (2010) 253, **Exhibit RL-69**, p. 260.

[88] F Berman, "Review of the Arbitral Tribunal's Jurisdiction in ICSID Arbitration" in: E Gaillard (ed), *The Review of International Arbitral Awards* (2010) 253, **Exhibit RL-69**, p. 259.

[89] P Lalive, "On the Reasoning of International Awards" (2010) 1(1) Journal of International Dispute Settlement 55, **Exhibit RL-63**, p. 61.

[90] Guatemala's Memorial on Annulment, paras. 84-88. *See also Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4) Decision on Annulment, 14 December 1989, **Exhibit RL-47**, para 5.03; *Wena Hotels Ltd v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Decision on Annulment, 5 February 2002, **Exhibit RL-64**, para. 22; *MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7) Decision on Annulment, 21 March 2007, **Exhibit RL-55**, para. 44.

examine this legal standard at all. In any case there is abundant jurisprudence on this point.[91] As explained in Professor Schreuer's commentary:

> Another instance of excess of powers would be a violation of Art. 42 on applicable law. Non-application of the law agreed by the parties or of the law determined by the residual rule in Art. 42(1) goes against the parties' agreement to arbitrate and may constitute an excess of power.[92]

53. Obviously this also applies when the governing law is international law, as Schreuer's commentary makes clear: "[a] general failure to apply international law, if it is part of the applicable law, would amount to an excess of powers exposing the award to annulment."[93]

A. THE TRIBUNAL EXCEEDED ITS POWERS IN ASSERTING JURISDICTION OVER A MERELY REGULATORY DOMESTIC LAW DISPUTE

1. The Tribunal did not examine the Treaty provision establishing the scope of its jurisdiction nor did it apply the *prima facie* test

54. As explained in its Memorial on Annulment,[94] Guatemala argued in the Arbitration that the Tribunal did not have jurisdiction *ratione materiae* because TGH only submitted a regulatory dispute under Guatemalan law, which had already been litigated before Guatemalan courts.[95] Guatemala based this objection on article 10.16.1(a)(i)(A) of the CAFTA-DR, the provision pursuant to which TGH submitted the dispute to the original

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91 E.g: *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19) Decision on Annulment, 14 June 2010, **Exhibit RL-65,** para. 46; *Caratube International Oil Company LLP v. The Republic of Kazakhstan* (ICSID Case No. ARB/08/12) Decision on the Annulment Application of Caratube Oil International, 21 February 2014, **Exhibit RL-52**, para. 79; *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru* (ICSID Case No. ARB/03/28) Decision on Annulment, 1 March 2011, **Exhibit RL-57**, paras. 95, 96, 99, 183-192; *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4) Decision on Annulment, 14 December 1989, **Exhibit RL-47**, para. 5.03; *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16) Decision on Annulment, 29 June 2010, **Exhibit RL-71**, paras. 208-209.

92 C Schreuer *et al.*, *The ICSID Convention, A Commentary*, 2nd ed, (2009), art. 52, p. 938, **Exhibit RL-40**, para. 133.

93 *Ibid.*, para. 263.

94 Guatemala's Memorial on Annulment, paras. 89-113.

95 Notice of Arbitration, para. 27; Memorial on Objections and Counter Memorial, paras. 98-112; Rejoinder paras. 31-37; Respondent's Reply Post-Hearing Brief, para. 46.

arbitral Tribunal.[96] Thus, this provision contained the written agreement to arbitrate that was applicable to the instant case. In accordance with this article, Guatemala consented to submit to arbitration disputes involving "a claim […] that the respondent has breached […] an obligation under Section A" of the Treaty.[97] Guatemala's consent did not refer, for example, to claims merely based on local law.

55. TGH appears to agree that the Treaty establishes the jurisdictional limitation *ratione materiae* identified by Guatemala.[98] TGH also agrees that, faced with this limitation, the Tribunal was bound to apply a *prima facie* test. In TGH's own words: "in assessing its jurisdiction *ratione materiae*, a tribunal must determine whether the facts, as alleged by the claimant, 'fall within [the treaty] provisions or are capable, if proved, of constituting breaches of the obligations they refer to.'"[99] TGH also cites jurisprudence on the duty to apply the *prima facie* test to adjudicate on jurisdictional objections *ratione materiae*.[100]

56. However, the Tribunal failed to address Guatemala's jurisdictional objection in any meaningful way. To begin with, the Tribunal did not even refer to article 10.16.1(a)(i)(A) of the CAFTA-DR, which was the consent provision that was the fundamental basis for Guatemala's objection.[101] TGH argues that this omission is irrelevant, that there was "no need for the Tribunal to analyze article 10.16.1(a)(i)(A) in detail in its Award, nor was there any need for the Tribunal to refer to or quote this provision," because "there was no dispute between the parties that TECO had invoked Section A of Article 10.16.1(a)(i), i.e., that TECO had submitted to arbitration a claim that Guatemala had breached its obligations under the Treaty."[102]

57. TGH's response pinpoints the fundamental shortcomings in the Tribunal's analysis. TGH had obviously invoked, or submitted its claim pursuant to, the above provision of the

[96] Notice of Arbitration, para. 27.

[97] CAFTA-DR, art. 10.16.1(a)(i)(A).

[98] TGH's Counter-Memorial on Annulment, paras. 28, 53.

[99] *Ibid.*, para. 53.

[100] *Ibid.*, paras. 53-55.

[101] Memorial on Objections and Counter-Memorial, Section II.B; Rejoinder, Section III; Respondent's Post-Hearing Brief, Section II.A; Respondent's Post-Hearing Brief Reply, Section II.

[102] TGH's Counter-Memorial on Annulment, para. 50.

Treaty.[103] The objection raised by Guatemala under article 10.16.1(a)(i)(A) therefore required an analysis of the real and fundamental basis of the claim. Instead, the Tribunal just accepted the formal legal characterization of the claim as presented by TGH. This is further examined below under the Tribunal's failure to provide reasons for its Award.[104]

58. TGH next argues that the Tribunal nevertheless "appl[ied] the *prima facie* test to the allegations advanced by TECO" as "the Tribunal properly held that TECO had 'made such (sic.) allegations that are such, if proved, as to establish a breach of Guatemala's obligations under the minimum standard.'"[105] This is incorrect. The Tribunal did not apply the *prima facie* test of jurisdiction at all, as the passage from the Award quoted by TGH above demonstrates:

> The Arbitral Tribunal considers that the Claimant has made allegations that are such, if proved, as to establish a breach of Guatemala's obligations under the minimum standard, as defined in previous sections of this award.[106]

59. Of course, TGH had made allegations of arbitrariness, bad faith, changes to the Regulatory Framework, breach of representations, etc., that, if proven, could constitute a violation of fair and equitable treatment. But the question is not what TGH had "alleged," but rather whether the facts supported, *prima facie*, those allegations. This analysis is simply absent from the Award. The Tribunal incorrectly accepted TGH's allegations as sufficient. The tribunal in the *Convial v Peru* case[107] confirmed this position in holding that an "ICSID arbitral tribunal does not have jurisdiction to decide a dispute solely because one of the parties invokes an alleged violation of the investment treaty in question," but rather it is "the party who invokes such an international violation [that

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103 Notice of Arbitration, para. 27.

104 *See* paras. 131-135.

105 TGH's Counter-Memorial on Annulment, para. 56 quoting the Award, para. 464.

106 Award, para. 464.

107 *Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru* (ICSID Case No. ARB/10/2) Final Award, 21 May 2013, **Exhibit RL-133**, para. 447.

must] sufficiently prove that the alleged facts '*if proved, may constitute a violation of the Treaty.*'"[108]

60. Hence, the Tribunal did not apply the *prima facie* test required to assess Guatemala's objection to jurisdiction. Instead, it incorrectly accepted TGH's allegations as sufficient without reviewing the underlying facts. This issue will be further developed in the section below on the Tribunal's failure to provide reasons.[109]

2. Under any objective characterization, the fundamental basis of the claim was a domestic law breach of the Regulatory Framework and not a genuine Treaty claim

61. The fact that the Tribunal did not carry out its task, as explained above, would be sufficient to annul the Award in its entirety for excess of powers. Namely, the Tribunal manifestly failed to carry out the mandate conferred to it by the Parties, i.e., to analyze the scope of its jurisdiction. Furthermore, this lack of analysis resulted in the Tribunal wrongly asserting jurisdiction on a pure domestic law dispute, which is also a manifest excess of powers.

62. TGH argues that there is no authority for the position that mere regulatory disputes under domestic law fall outside of the jurisdiction of an investment treaty tribunal, which is only authorized, as in this Arbitration, to adjudicate breach of treaty claims.[110] For TGH the question of whether a claim is a mere domestic law dispute or may also rise to the level of a treaty claim is always a decision for the merits. TGH argues that the cases cited by Guatemala to support its objection *ratione materiae* were final awards and not jurisdictional decisions. TGH adds that the only issue of jurisdiction *ratione materiae* that may arise regarding the nature of a claim is that concerning the distinction between contract and treaty claims.[111]

63. This is incorrect. To be clear, Guatemala does not argue that <u>no</u> regulatory domestic law dispute can ever rise to an investment treaty claim, but rather that a <u>mere</u> dispute of this

[108] *Ibid.*, para. 447. Unofficial English translation. *See* para. 143, for the Spanish original.

[109] *See* paras. 136-147.

[110] TGH's Counter-Memorial on Annulment, paras. 57-59.

[111] *Ibid.*, paras. 57-59.

nature cannot do so.[112] Mere domestic regulatory disputes fall under the jurisdiction of domestic courts, and an investment treaty claim may arise only in case of denial of justice by those courts.

64. The case of *ADF v United States* illustrates this point. This dispute concerned regulatory measures relating to the construction of a highway. The tribunal indicated that it did not have "*authority*" or "*jurisdiction*" under the NAFTA over such measures under domestic law:

> [T]he Tribunal has no authority to review the legal validity and standing of the U.S. measures here in question under *U.S. internal administrative law*. We do not sit as a court with appellate jurisdiction with respect to the U.S. measures. Our jurisdiction is confined by NAFTA Article 1131(1) to assaying the consistency of the U.S. measures with relevant provisions of NAFTA Chapter 11 and applicable rules of international law. The Tribunal would emphasize, too, that even if the U.S. measures were somehow shown or admitted to be *ultra vires* under the internal law of the United States, that by itself does not necessarily render the measures grossly unfair or inequitable under the customary international law standard of treatment embodied in Article 1105(1). An unauthorized or *ultra vires* act of a governmental entity of course remains, in international law, the act of the State of which the acting entity is part, if that entity acted in its official capacity. But something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1), even under the Investor's view of that Article. That "something more" has not been shown by the Investor.[113] (Emphasis added.)

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[112] Guatemala's Memorial on Annulment, paras. 89, 111-113.

[113] *ADF Group Inc v. United States of America* (ICSID Case No. ARB(AF)/00/1) Award, 9 January 2003, **Exhibit CL-4,** para. 190 (emphasis added). *See also Robert Azinian et al. v. United Mexican States* (ICSID Case No. ARB(AF)/97/2) Award, 1 November 1999, **Exhibit RL-2**, para. 90; *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13) Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, **Exhibit RL-73**, para. 145; *SGS Société Générale de Surveillance S.A. v. Philippines* (ICSID Case No. ARB/02/6) Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, **Exhibit CL-69**, para. 157; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Paraguay* (ICSID Case No. ARB/07/9) Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, **Exhibit RL-74**, paras. 127, 148-149; *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3) Decision of the Tribunal on Objections to Jurisdiction, 22 April 2005, **Exhibit CL-63**, para. 243.

65. The *ADF* tribunal made this holding in the final award, but the principle expressed by the tribunal relates to its jurisdiction and competence, and is thus directly relevant here. The tribunal was examining its jurisdiction as "confined by NAFTA Article 1131(1) to assaying the consistency of the U.S. measures with relevant provisions of NAFTA Chapter 11 and applicable rules of international law." Here the jurisdiction of the Tribunal was confined to breaches of the CAFTA-DR by its article 10.16.1(a)(i)(A), but the Tribunal did not carry out the analysis set out by the *ADF* tribunal.

66. The tribunal in *S.D. Myers v Canada* also held that its "mandate," i.e., its jurisdiction, could not extend to a purely domestic law regulatory dispute:

> When interpreting and applying the "minimum standard", a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. […] The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes […].[114] (Emphasis added.)

67. Similarly, the tribunal in *Generation Ukraine v Ukraine* held that "[t]his Tribunal is not endowed with general jurisdiction to hear claims based on any source of law arising at any point in time against any potential defendant. The jurisdiction of the Tribunal is limited to investment disputes […]."[115] On this basis it found that its "function" could not extend to pure regulatory domestic law disputes:

> This Tribunal does not exercise the function of an administrative review body to ensure that municipal agencies perform their tasks diligently, conscientiously or efficiently. That function is within the proper domain of the domestic courts and tribunals that are cognizant of the minutiae of the applicable regulatory regime […] the only possibility in this case for the series of complaints relating to highly technical matters of Ukrainian planning law to be transformed into a BIT violation would have been for the Claimant to be denied

[114] *SD Myers Inc v. Canada* (UNCITRAL Case) First Partial Award, 13 November 2000, **Exhibit CL-41**, para. 261.

[115] *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9) Final Award, 16 September 2003, **Exhibit RL-6**, para. 8.10 (emphasis added).

justice before the Ukrainian courts in a *bona fide* attempt to resolve these technical matters.[116] (Emphasis added.)

68. The decision in *Saluka v Czech Republic* is also applicable:

> [...] The Treaty cannot be interpreted so as to penalise each and every breach by the Government of the rules or regulations to which it is subject and for which the investor may normally seek redress before the courts of the host State.
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> As the tribunal in *ADF Group Inc.* has stated with regard to the "fair and equitable treatment" standard contained in Article 1105(1) NAFTA:
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>> something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements.[117] (Emphasis added.)

69. Another well-known example is *Azinian v Mexico*. In that case, the tribunal examined whether the dispute was one "[…] founded upon the violation of an obligation established in Section A"[118] (investment protections) of NAFTA, which is the exact same requirement as the one contained in article 10.16.1(a)(i)(A) of the Treaty. Thus, the decision was on jurisdiction. The tribunal made a general holding that a mere domestic law dispute cannot automatically give rise to a treaty claim:

> Arbitral jurisdiction under Section B is limited not only as to the persons who may invoke it (they must be nationals of a State signatory to NAFTA), but also as to subject matter: claims may not be submitted to investor-state arbitration under Chapter Eleven unless they are founded upon the violation of an obligation established in Section A. […]
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> It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints. It may safely be assumed that many ***Mexican*** parties can be found who had business dealings with

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116 *Ibid.*, para. 20.33.

117 *Saluka Investments B.V. v. Czech Republic* (UNCITRAL Case) Partial Award, March 17, 2006, **Exhibit CL-42**, paras. 442-443.

118 *Robert Azinian et al. v. United Mexican States* (ICSID Case No. ARB(AF)/97/2) Award, 1 November 1999, **Exhibit RL-2** (English version), para. 82.

governmental entities which were not to their satisfaction; Mexico is unlikely to be different from other countries in this respect. NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides.[119] (Emphasis added.)

70. The *Azinian* tribunal added as follows:

> With the question thus framed, it becomes evident that for the Claimants to prevail it is not enough that the Arbitral Tribunal disagree with the determination of the Ayuntamiento. A governmental authority surely cannot be faulted for acting in a manner validated by its courts ***unless the courts themselves are disavowed at the international level***. As the Mexican courts found that the Ayuntamiento's decision to nullify the Concession Contract was consistent with the Mexican law governing the validity of public service concessions, the question is whether the Mexican court decisions themselves breached Mexico's obligations under Chapter Eleven.[120] (Emphasis in bold in the original; underlined emphasis added.)

71. The tribunal in *Iberdrola v Guatemala* upheld precisely the principle that mere regulatory domestic law disputes are not investment treaty disputes. TGH argues that the *Iberdrola* tribunal based its decision on the manner in which Iberdrola presented its claim, and not on the principle that a treaty tribunal may not have jurisdiction on a mere domestic law regulatory claim.[121] Again, this is not correct. The tribunal in *Iberdrola* found for example as follows:

> [A]s the Claimant notes, that the legality of the conduct of a State under its domestic law does not necessarily lead to the legality of such conduct under international law. But […] an ICSID tribunal, constituted under the Treaty, cannot determine that it has the competence to judge, under international law, the interpretation made by the State of its domestic legislation, simply because the investor does not share this or considers it arbitrary or in violation of the Treaty.[122] (Emphasis added.)

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119 *Ibid.*, paras. 82-83.

120 *Ibid.*, para. 97.

121 TGH's Counter-Memorial on Annulment, paras. 59-61.

122 *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, 17 August 2012, **Exhibit RL-32**, para. 367.

72. The annulment committee in the *Iberdrola* case confirmed the original tribunal's holding:

> Finally, the Tribunal considers that ICSID lacked jurisdiction and the Tribunal lacked jurisdiction [too], since Iberdrola's claim could be qualified solely from a domestic law perspective, and the Treaty granted jurisdiction only for breaches of international law.[123]

73. Thus there is an established principle that mere regulatory domestic law disputes, which do not give rise to treaty claims, may fall outside of the jurisdiction of investment treaty tribunals.

74. The facts of the present case are identical to those in the *Iberdrola* arbitration, in which the tribunal clearly identified the claim as merely relating to a domestic regulatory dispute, in spite of the fact that Iberdrola had framed the case as concerning a breach of the investment treaty:

> As stated by the Tribunal and the file proves, beyond qualification that the Claimant gave the disputed issues, the substance of these issues and, above all, of the disputes that the Claimant asks the Tribunal to rule on, refer to Guatemalan law. In the various briefs filed in the arbitration, the Parties discussed at length about how certain provisions of Guatemalan law should be interpreted, and particularly, the provisions of the LGE and RLGE.[124]

75. Thus, the essence of Iberdrola's claim, which was the same as TGH's claim in this Arbitration, was a mere regulatory disagreement under local law, which the tribunal summarized as follows:

> The Tribunal, according to the claim filed by the Claimant, would have to act as regulator, as administrative entity and as a

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[123] *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Decision on Annulment, 13 January 2015, **Exhibit RL-130**, para. 88. Unofficial English translation. In its original Spanish language it reads:

> En definitiva, el Tribunal consideró que el CIADI carecía de jurisdicción y el Tribunal de competencia, porque la demanda de Iberdrola era calificable únicamente bajo la perspectiva del derecho interno, y el Tratado otorgaba jurisdicción sólo para el conocimiento de incumplimientos de derecho internacional.

[124] *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, 17 August 2012, **Exhibit RL-32**, para. 351.

[local] court […], to define, among others and in light of Guatemalan law, the following matters:

[…]

b. The extent of the distributor's participation in the VAD calculation (particularly, based on LGE Articles 74 and 75 and RLGE Articles 97 and 98) and if the consultant had the power to separate from the Terms of Reference.

c. The correct formula for calculating the VAD and in particular to define […] whether the correct VAD was the result of the first study of Bates White, that of the second study of the same company, that determined by the Expert Commission, that defined by Sigla, […].

d. The correct interpretation of LGE Articles 73 and 79 that indicate the discount rate to be used to calculate the tariffs.

[…]

f. The correct interpretation of the rules concerning the contracting of tariff studies and whether those rules authorized the CNEE to contract its own tariff study, independent of the distributor's study.

g. The powers of the CNEE and, particularly, but not exclusively, if these powers were simply of supervision, with respect to the determination of the tariffs, or whether it was responsible for setting those tariffs.

h. Whether the pronouncement of the Expert Commission was binding, (as noted, this matter received extensive discussion based on the criteria of interpretation of Guatemalan law).

i. If there was an agreement between the CNEE and EEGSA on the operating rules of the Expert Commission. If so, whether that agreement was valid.

j. Whether the unilateral decision of the CNEE to dissolve the Expert Commission was legal.

k. If the conduct of the CNEE in rejecting the Claimant's consultant's study and accepting that of Sigla was legal.[125] […]

[125] *Ibid.*, para. 354.

76. These are the same issues raised by TGH in this case, and which the *Iberdrola* tribunal characterized as a mere local regulatory dispute:

> In summary, the Claimant requests the Tribunal to act as [a domestic] judge […] to decide the debate that took place in accordance with Guatemalan law and to rule that it is right in its interpretation of each of the issues discussed, so that as from the decision of this Tribunal, the Claimant can construct and claim a violation of the standards of the Treaty.[126] (Emphasis added.)

77. In short, as explained above, the *Iberdrola* tribunal concluded that the claim was purely based on Guatemalan law and was not a genuine claim under the treaty over which it could have jurisdiction.

78. The Tribunal in this case should have reached the same conclusion. It rightly characterized the dispute as concerning the Regulatory Framework, holding that: "[t]his dispute arose from the alleged violation […] of the Guatemalan regulatory framework,"[127] "[t]he Claimant's case is based in large part on the assertion that the CNEE […] disregarded the regulatory framework applicable to the setting of electricity tariffs in Guatemala, as established by the LGE and the RLGE,"[128] and that "[t]he question here is whether the regulatory framework permitted the regulator, in the circumstances of the case, to disregard the distributor's study and to apply its own."[129]

79. However, the Tribunal failed to draw the correct conclusion from its own analysis. It did not examine in any meaningful way Guatemala's objection *ratione materiae* that a dispute of such nature did not rise to a Treaty dispute. It failed to examine the Treaty provision upon which the objection was based and did not apply the *prima facie* test or any other jurisdictional test.

80. The Tribunal simply accepted the characterization of the claims as put forward by TGH and affirmed its jurisdiction. In doing so it manifestly exceeded its powers because it

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126 *Ibid.*, para. 355.

127 Award, para. 79.

128 *Ibid.*, para. 497.

129 *Ibid.*, para. 534.

abdicated its judicial function and upheld and exercised jurisdiction when it did not have such jurisdiction. Consequentially, the Tribunal ended up reversing the Constitutional Court's decisions and equating a domestic law breach to a Treaty breach, to which we now turn.

B. THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS IN REVIEWING AND *DE FACTO* REVOKING THE CONSTITUTIONAL COURT'S DECISIONS

81. As explained in Guatemala's Memorial on Annulment,[130] it is a fundamental principle of international law that an investment treaty tribunal may not review decisions by national courts on local law matters, except in case of denial of justice. Otherwise, the distinction between domestic and international law standards would be blurred.

82. This was recently reaffirmed in the case of *Hassan Awdi v Romania*:

> As stated by an investment treaty tribunal, "[a]n ICSID Tribunal will not act as an instance to review matters of domestic law in the manner of a court of higher instance." Instead, the Tribunal will accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice.[131] (Emphasis added.)

83. Likewise the Tribunal in *Apotex v United States* reviewed existing jurisprudence and held as follows:

> First, as a general proposition, it is not the proper role of an international tribunal established under NAFTA Chapter Eleven to substitute itself for the U.S. Supreme Court, or to act as a supranational appellate court. This has been repeatedly emphasized in previous decisions. For example:
>
> (a) ***Mondev*** Award, at paragraph 126:
>
> > "Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal."

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[130] Guatemala's Memorial on Annulment, paras. 115-119.

[131] *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania* (ICSID Case No. ARB/10/13) Award, 2 March 2015, **Exhibit RL-134**, para. 327.

(b) ***Azinian*** Award, at paragraph 99:

> "The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA."

(c) ***Waste Management*** Award, at paragraph 129:

> "Turning to the actual reasons given by the federal courts, the Tribunal would observe that it is not a further court of appeal, nor is Chapter 11 of NAFTA a novel form of amparo in respect of the decisions of the federal courts of NAFTA parties."[132] (Emphasis added.)

84. In the words of the tribunal in *Jan de Nul v Egypt*:

> It is not the role of a tribunal constituted on the basis of a BIT to act as a court of appeal for national courts. The task of the Tribunal is rather to determine whether the Judgment is "*clearly improper and discreditable*" in the words of the *Mondev* tribunal.[133] (Emphasis added.)

85. Guatemala's Memorial on Annulment already cited abundant jurisprudence, like the following holding in *Arif v Moldova*:

> [I]nternational tribunals must refrain from playing the role of ultimate appellate courts. They cannot substitute their own application and interpretation of national law to the application by national courts. It would blur the necessary distinction between the hierarchy of instances within the national judiciary and the role of international tribunals if "*[a] simple difference of opinion on the part of the international tribunal is enough*" to allow a finding that a national court has violated international law. The opinion of an international tribunal that it has a better understanding of national law than the national court and that the national court is in error, is not enough. In fact –as Claimant formulated– arbitral tribunals cannot "*put*

132 *Apotex Inc. v. United States* (UNCITRAL) Award on Jurisdiction and Admissibility, 14 June 2013, **Exhibit RL-135**, para. 278 (bold and italics in original).

133 *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13) Award, 6 November 2008, **Exhibit RL-11**, para 209.

> *themselves in the shoes of international appellate courts*."[134] (Emphasis added.)

86. Thus, an investment treaty tribunal may not review decisions by national courts on local law matters. Nor can a public authority be in breach of international law for implementing a decision supported by its local courts unless the local courts' decision itself is challenged under international law for denial of justice, as held in *Azinian v Mexico*:

> The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. ***What must be shown is that the court decision itself constitutes a violation of the treaty***. Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end.[135] (Emphasis in bold in the original; underlined emphasis added.)

87. Hence, international law precludes review of domestic court decisions on questions of local law. TGH argues, however, that "even in cases where the State's domestic courts are implicated, investment treaty tribunals have recognized that a breach of the fair and equitable treatment standard can occur separate and apart from any treatment accorded by the domestic courts."[136] This, however, is not the point. There are many cases in which claims are not based purely on domestic law even if domestic law plays a role. The point here is whether an investment tribunal can find a breach of domestic law, where a local

[134] *Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23) Award, 8 April 2013, **Exhibit RL-46**, para. 441. *See also ADF Group Inc v. United States of America* (ICSID Case No. ARB(AF)/00/1) Award, 9 January 2003, **Exhibit CL-4,** para. 190; *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Award, 30 April 2004, **Exhibit CL-46**, para. 129.

[135] *Robert Azinian et al. v. United Mexican States* (ICSID Case No. ARB(AF)/97/2) Award, 1 November 1999, **Exhibit RL-2**, para. 99.

[136] TGH's Counter-Memorial on Annulment, paras. 62-67.

court has found none, and base its decision of breach of the treaty on that very same breach of domestic law.

88. For example, TGH cites in support of its position the award in *Vivendi v Argentina* (*Vivendi II* award) which concerned governmental (and parliamentary) actions over the course of several years that "improperly and without justification, mounted an illegitimate 'campaign' against the concession, the Concession Agreement, and the 'foreign' concessionaire from the moment it took office, aimed [...] at reversing the privatization."[137] There is no suggestion that there is any such bad faith political campaign underlying the application of a domestic regulatory framework in this case.[138]

89. In this Arbitration, the Tribunal itself admitted that it could not review the decisions of the Constitutional Court:

> It is indeed true that the Guatemalan courts have decided some of the questions in dispute concerning the interpretation of the Guatemalan Regulatory Framework and the regularity of some of the CNEE's decisions under such law. It is also true that this Arbitral Tribunal will have to apply Guatemalan law to some of the regulatory aspects of the dispute, and that, in so doing, it may have to defer to the decisions made by the Guatemalan courts when such aspects of the dispute are subject to Guatemalan law.[139] (Emphasis added.)
>
> This Tribunal's task is not and cannot be to review the findings made by the courts of Guatemala under Guatemalan law.[140] […] (Emphasis added.)

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137 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina* (ICSID Case No. ARB/97/3) Award, 20 August 2007, **Exhibit CL-18,** paras. 7.4.10-7.4.11.

138 Similarly, other case law relied on by TGH in its Counter-Memorial on Annulment does not support its position. In *ATA Construction v. Jordan* (ICSID Case No. ARB/08/2) Award, 18 May 2010, **Exhibit CL-58** (TGH's Counter-Memorial on Annulment, para. 64), the tribunal declined jurisdiction over all claims in connection with the annulment of the award by the domestic court pursuant to domestic law. In *CME v. Czech Republic* (UNCITRAL) Partial Award, 13 September 2001, **Exhibit CL-16** (TGH's Counter-Memorial on Annulment, para. 65), the subject-matter of the domestic court proceedings was entirely different from that before the arbitral tribunal. The local controversy concerned a commercial dispute between the investors' joint venture company in the Czech Republic and its shareholders and/or business partners while the treaty dispute concerned the government's interference in that controversy, which was not at issue in the local court proceedings (*CME*, paras. 403-404).

139 Award, para. 474.

140 *Ibid.*, para. 477.

90. As explained in Guatemala's Memorial on Annulment,[141] the Tribunal did exactly the opposite in the Award. It reviewed and in fact reversed the Constitutional Court's decisions.

91. TGH responds by saying that the Tribunal noted that "the disputes resolved by the Guatemalan judiciary are not the same as the one which this Arbitral Tribunal now has to decide" and that the Tribunal "may of course give deference to what was decided as a matter of Guatemalan law by the Guatemalan Constitutional Court," but that "such decisions made under Guatemalan law cannot be determinative of this Arbitral Tribunal's assessment of the application of international law to the facts of the case."[142]

92. Had there been a Treaty dispute distinct from the mere domestic law controversy, the Tribunal would have been right in the passages cited by TGH above, or in holding that "the decisions of the Constitutional Court cannot have the effect of a precedent or have any *res judicata* effect" upon such dispute.[143] However, the point is that there was no such distinct Treaty dispute and the Tribunal adjudicated on the purely Guatemalan law controversy already resolved by the Constitutional Court, thus reversing the Court's holdings.

93. This is clear from the Tribunal's decision on the merits[144] where the Tribunal rejected the claims relating to the modification of the Regulatory Framework and of legitimate expectations, as well as other numerous allegations by TGH. The Tribunal's decision that Guatemala breached the international minimum standard of the Treaty was based solely on Resolution 144-2008, and its alleged unlawfulness under the Regulatory Framework.

94. The relevant findings by the Tribunal on the CNEE's breach of the Regulatory Framework and Guatemala's liability under the Treaty can be found at Section 3.(d) of the merits part of the Award. That Section is entirely dedicated to Resolution 144-2008. First the Tribunal quotes the entirety of the text of the Resolution:

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141 Guatemala's Memorial on Annulment, paras. 120-144.

142 TGH's Counter-Memorial on Annulment, paras. 70 and 90, quoting the Award at paras. 483 and 516-519.

143 Award, para. 516.

144 *See* paras. 35-36.

> On July 29, 2008, the CNEE adopted its Resolution No. 144-2008, whereby it decided to fix the tariff on the basis of the VAD report prepared by its own consultant Sigla.
>
> Resolution No. 144-2008 reads in the relevant parts as follows: […].[145]

95. Then the Tribunal examines the Regulatory Framework in relation to the Resolution and states:

> Based on those principles, the Arbitral Tribunal will now assess whether Resolution No. 144-2008 is arbitrary and constitutes a breach of the State's international obligations under the minimum standard of treatment.[146]

96. The Tribunal concludes that the Resolution breached the Regulatory Framework and was thus arbitrary and lacked due process:

> The Arbitral Tribunal disagrees with the Respondent for the reasons that will be explained below. In the Arbitral Tribunal's view, <u>in adopting Resolution No. 144–2008</u>, in disregarding without providing reasons the Expert Commission's report, and in unilaterally imposing a tariff based on its own consultant's VAD calculation, <u>the CNEE acted arbitrarily and in violation of fundamental principles of due process in regulatory matters</u>.[147] (Emphasis added.)

97. The Tribunal finally concludes that the Resolution is contrary to the Regulatory Framework and the minimum standard of treatment under the Treaty:

> The Arbitral Tribunal therefore concludes that <u>Resolution No. 144-2008 is inconsistent with the regulatory framework</u>. By rejecting the distributor's study because it had failed to incorporate the *totality* of the observations that the CNEE had made in April 2008, with no regard and no reference to the conclusions of the Expert Commission, the CNEE acted arbitrarily and in breach of the administrative process established for the tariff review.

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[145] Award, paras. 658-659.

[146] *Ibid.*, para. 671.

[147] *Ibid.*, para. 664.

> In the Arbitral Tribunal's view, both the regulatory framework and the minimum standard of treatment in international law obliged the CNEE to act in a manner that was consistent with the fundamental principles on the tariff review process in Guatemalan law.[148] (Emphasis added.)

98. Hence the Award is clearly based on Resolution 144-2008 and its purported inconsistency with the Regulatory Framework. Yet Resolution 144-2008 was the very measure under review in the decision of the Constitutional Court of 18 November 2009. In that decision the Court had already evaluated and discarded the argument that the Resolution was arbitrary and breached the Regulatory Framework. This is how the Constitutional Court identified the issue at stake in the domestic court proceedings:

> In the case in point, Empresa Eléctrica de Guatemala, Sociedad Anónima, claims a constitutional guarantee of amparo against the National Electricity Commission, for having issued resolution CNEE-144-2008 on 29 July of the same year, published two days later in the Central American Journal, whereby the challenged authority definitively approved the tariff study prepared by the Association of Companies formed by Sistemas Eléctricos y Electrónicos de Potencia, Control y Comunicaciones, Sociedad Anónima and Sigla, Sociedad Anónima. The petitioner considers that the challenged authority violated its rights because despite having exhausted the process for setting the electricity tariffs with strict adherence to the General Electricity Law and its Regulations, it set the tariffs in accordance with the tariff study it had prepared on its own; thus failing to adhere to the expert report that the Commission had already issued. It states that the challenged act arbitrarily asserted the power to unilaterally approve an independent tariff study, without the assumption that is referred to in Article 98 of the General Electricity Law Regulations that allows the exercise of this power, having occurred.[149] (Emphasis added.)

99. The Constitutional Court concluded that Resolution 144-2008 fell within the scope of the CNEE's powers and that the CNEE had "follow[ed] the process regulated by law" and had not acted arbitrarily.[150] In particular, it found that the report of the Expert

148 *Ibid.*, paras. 681-682.

149 Judgment of the Constitutional Court, 18 November 2009, **Exhibit R-105**, pgs. 14-15, Section II.

150 *Ibid.*, pgs. 31-32.

Commission was non-binding and that the CNEE could decide whether or not to accept the Bates White study and whether to adopt the Sigla study to establish the tariffs.[151] In reaching the opposite conclusion, i.e., that Resolution 144-2008 breached the Regulatory Framework and was arbitrary, the Award reversed the decision of the Constitutional Court.

100. In its decision of 24 February 2010,[152] the Constitutional Court further concluded that Resolution 144-2008 was issued in accordance with the law:[153]

> This Court, as it did in the [proceedings that resulted in the decision of 18 November 2009], upon reviewing, in the light of the aforementioned body of laws, the manner in which this administrative case – the cause of this amparo action – was conducted, determines that the procedure followed by the petitioner and the challenged authority was conducted in accordance with the aforesaid Law and Regulations.[154] […] (Emphasis added.)

101. Hence, the Tribunal in the Award also reversed the decision of the Constitutional Court of 24 February 2010.

102. TGH argues that the Tribunal distinguished the decisions of the Constitutional Court from the Tribunal's merits decision in the Award. For example, TGH states that "the Tribunal found that neither EEGSA nor the CNEE had requested the Constitutional Court to decide whether […] amended RLGE Article 98 […] would have entitled the CNEE to set EEGSA's tariffs on the basis of its own VAD study."[155] Further, TGH contends that "the Tribunal also found that, despite holding that the Expert Commission's report was not binding under Guatemalan law, the Constitutional Court had not decided whether the CNEE nonetheless had the duty to consider it and to provide reasons for its decisions to disregard it."[156]

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151 *Ibid.*, pgs**.** 25-27.

152 Judgment of the Constitutional Court, 24 February 2010, **Exhibit R-110**.

153 *Ibid.*, pgs. 27-28.

154 *Ibid.*, p. 28.

155 TGH's Counter-Memorial on Annulment, para. 92.

156 *Ibid.*, para. 94.

103. The Tribunal did attempt to draw these distinctions in the Award. However, those were false distinctions, and the Tribunal ended up grounding its decision on an issue directly resolved by the Constitutional Court. As already explained above and as is further explained below,[157] the Tribunal's merits decision was based on Resolution 144-2008, and on its alleged breach of the Regulatory Framework and its arbitrariness. In that Resolution the CNEE decided to reject the Bates White study and not implement the recommendations contained in the Expert Commission's report. Further, it did so on the basis of article 98 of the RLGE as amended. The Constitutional Court decision of 18 November 2009 upheld precisely the consistency of Resolution 144-2008 with the entire Regulatory Framework.

104. In particular, in deciding that the Regulatory Framework contains a further requirement regarding the level of reasoning that the CNEE must observe in rendering decisions, and in deciding that Resolution 144-2008 breached that requirement, the Tribunal made a different interpretation of the Regulatory Framework with respect to that of the Constitutional Court. This necessarily implies a revision of the decisions of the Constitutional Court. It involves censoring the Court for failing to recognize what the Tribunal deems a "fundamental" tenet of the Regulatory Framework. The result could not be more inconsistent: for the Court, Resolution 144-2008 was lawful; for the Tribunal, it was not only unlawful, but contrary to "fundamental principles" of the Regulatory Framework.[158]

105. In so doing, the Tribunal "[…] blur[red] the necessary distinction between the hierarchy of instances within the national judiciary and the role of international tribunals […]," and breached the basic principle of international law outlined above that "arbitral tribunals cannot '*put themselves in the shoes of international appellate courts*,'"[159] as well as that they do not sit "[…] as an ultimate appellate court, reviewing decisions of domestic supreme courts for correctness."[160]

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157 *See* paras. 11-13, 92-100 and Section IV.C.

158 Award, paras. 664-665.

159 *Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23) Award, 8 April 2013, **Exhibit RL-46**, para. 441.

160 *Ibid.*, para. 260.

106. Therefore, the Tribunal clearly exceeded its powers. Had the Tribunal respected the limits of its jurisdiction, i.e., that it could not ignore or review local judicial decisions on questions of local law, then it could not hold that "[if] the CNEE willfully disregarded the fundamental principles of the regulatory framework in force at the time of the tariff review process in dispute, such a disregard would amount to a breach of international law."[161] The Tribunal so held and thus manifestly exceeded its powers.

C. THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS IN FAILING TO APPLY INTERNATIONAL LAW AND EQUATING A BREACH OF DOMESTIC LAW TO A BREACH OF THE CAFTA-DR

107. As explained in Guatemala's Memorial on Annulment,[162] the law applicable to the merits of this case was the Treaty and customary international law. The CAFTA-DR requires that when a claim is submitted by an investor against a member State, "the tribunal shall decide the issues in dispute in accordance with this [Treaty] and applicable rules of international law."[163] TGH based its claim on the minimum standard of treatment under article 10.5 of the CAFTA-DR. In its Counter-Memorial on Annulment, TGH does not dispute that the Tribunal was bound to apply international law to resolve the dispute.[164]

108. Further, article 10.5 of the CAFTA-DR refers to "treatment in accordance with customary international law" and "prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment." CAFTA-DR Annex 10-B makes clear that "'customary international law' generally and as specifically referenced in Articles 10.5, […] results from a general and consistent practice of States that they follow from a sense of legal obligation."

109. In their pleadings, the Parties extensively briefed their views on the content of the international minimum standard.[165] Guatemala described in detail its position on the

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[161] Award, para. 481 (emphasis added).

[162] Guatemala's Memorial on Annulment, paras. 145-174.

[163] CAFTA-DR, art. 10.22(1).

[164] TGH's Counter-Memorial on Annulment, paras. 74-85.

[165] Claimant's Memorial, paras. 228-280; Memorial on Objections and Counter-Memorial, paras. 460-590; Reply, paras. 228-282; Rejoinder, paras. 79-213; Claimant's Rejoinder on Jurisdiction and Admissibility, paras. 14-24; Claimant's Post-Hearing Brief, paras. 11-164; Respondent's Post-Hearing Brief, paras. 247-332; Claimant's Post-Hearing Brief Reply, paras. 41-123; Respondent's Post-Hearing Brief Reply, paras. 114-159.

international minimum standard and how it differed from the autonomous standard of fair and equitable treatment.[166] Together, TGH and Guatemala dedicated 447 pages of their pleadings to this subject,[167] and cited no fewer than 150 legal authorities on the content and scope of the international minimum standard, mainly case law but also doctrinal and scholarly writings.

110. Guatemala, for example, relied on *Myers v Canada* for the proposition that "[w]hen interpreting and applying the 'minimum standard', a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making."[168] Guatemala also referred, for example, to *Thunderbird v Mexico* which held that the threshold to breach the minimum standard of treatment is "gross denial of justice or manifest arbitrariness falling below acceptable international standards," and administrative conduct "grave enough to shock a sense of judicial propriety."[169]

111. Other authorities cited by Guatemala included *GAMI v Mexico*, which found that the minimum standard of treatment is breached by an "'outright and unjustified repudiation' of the relevant regulations,"[170] and *Cargill v Mexico*, which held that what must be determined is "whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and

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166 Memorial on Objections and Counter-Memorial, paras. 460-494; Rejoinder, paras. 79-104, 182-213; Respondent's Post-Hearing Brief, paras. 247-332; Respondent's Post-Hearing Brief Reply, paras. 114-159.

167 Claimant's Memorial, pgs. 137-170; Memorial on Objections and Counter-Memorial, pgs. 201-258; Reply, pgs. 190-235; Rejoinder, pgs. 41-106; Claimant's Rejoinder on Jurisdiction and Admissibility, pgs. 7-16; Claimant's Post-Hearing Brief, pgs. 7-124; Respondent's Post-Hearing Brief, pgs. 98-131; Claimant's Post-Hearing Brief Reply, pgs. 30-98; Respondent's Post-Hearing Brief Reply, pgs. 48-69.

168 *SD Myers Inc v. Canada* (UNCITRAL Case) First Partial Award, 13 November 2000, **Exhibit CL-41**, para. 261.

169 *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL Case) Award, 26 January 2006, **Exhibit CL-25**, paras. 194, 200.

170 *GAMI Investments, Inc v. Mexico* (UNCITRAL Case) Final Award, 15 November 2004, **Exhibit RL-7**, paras. 103-104.

shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive."[171]

112. Guatemala's position was supported by the detailed written submissions of four other CAFTA-DR member States,[172] including the United States –TGH's State of nationality. The United States submitted that the CAFTA-DR language demonstrated "the State Parties' intention that Article 10.5 articulate a standard found in customary international law,"[173] that "[t]he burden is on the claimant" *inter alia* to prove custom, and that "[d]etermining a breach of the minimum standard of treatment 'must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders.'"[174] The U.S. concluded as follows:

> Regulatory action violates "fair and equitable treatment" under the minimum standard of treatment where, for example, it amounts to a denial of justice, as that term is understood in customary international law, or manifest arbitrariness falling below the international minimum standard.[175]

113. El Salvador confirmed that "the concept of 'fair and equitable treatment' in article 10.5 of the Treaty does not include the protection of an investor's legitimate expectations and does not include protection against merely arbitrary measures."[176] The Dominican Republic, in turn, explained:

> [O]nly conduct which is manifestly arbitrary, blatantly condemnable and very serious conduct may be claimed under

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171 *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, **Exhibit CL-12**, para. 296. *See also Glamis Gold Ltd. v. United States of America* (UNCITRAL Case) Award, 8 June 2009, **Exhibit CL-23**, paras. 616-617, 762, 779.

172 Non-Disputing Party Submission of the Dominican Republic, 5 October 2012; Non-Disputing Party Submission of the Republic of El Salvador, 5 October 2012; Non-Disputing Party Submission of the United States of America, 23 November 2012; Non-Disputing Party Submission of the Republic of Honduras, undated.

173 Non-Disputing Party Submission of the United States of America, 23 November 2012, para. 4.

174 *Ibid.*, para. 7.

175 *Ibid.*, para. 6.

176 Non-Disputing Party Submission of the Republic of El Salvador, 5 October 2012, para. 17.

> CAFTA-DR 10.5 and not a mere breach or mere arbitrariness.[177]

114. For its part, Honduras described the standard as:

> [T]he most limited concept possible of 'fair and equitable treatment' as part of the minimum standard of treatment under customary international law […] an absolute 'floor' […] only State actions of an extreme, excessive or injurious nature can violate the minimum standard of treatment, […] a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination or a manifest failure to state reasons for a decision.[178]

115. The United States, El Salvador and the Dominican Republic also made oral presentations at the hearing, raising the same points as in their written submissions.[179]

116. Hence, the Tribunal was bound to apply international law, in particular the international minimum standard of treatment of article 10.5 of the Treaty. This in turn required a careful distinction between the autonomous standard of "fair and equitable treatment" and that under customary international law. Further, the Tribunal needed to examine customary international law in detail, as provided by the CAFTA-DR. The scope of this principle had been abundantly briefed by the Parties and by the non-disputing parties, which had also made clear the delicate task to be carried out by the Tribunal.

117. The Tribunal did not carry out this task. In its Counter-Memorial on Annulment TGH argues that the Tribunal's international law analysis is contained in paragraphs 454 to 458 of the Award.[180] However, those four paragraphs show the lack of any real examination of the standard by the Tribunal, let alone any consideration of the Parties' positions, the submissions made by the non-disputing parties or any scrutiny of customary international law. Instead, in paragraph 454 the Tribunal was happy to just enunciate, within the section on jurisdiction of the Award, the following:

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177 Non-Disputing Party Submission of the Dominican Republic, 2 October 2012, para. 8.

178 Non-Disputing Party Submission of the Republic of Honduras, undated, paras. 6, 9-10.

179 Tr. (English), Day Five, 822:2-824:7, United States; Tr. (English), Day Five, 808:18-816:14, El Salvador, and Tr. (English), Day Five, 817:2-821:20, Dominican Republic.

180 TGH's Counter-Memorial on Annulment, paras. 76-78.

> The Arbitral Tribunal considers that the minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety.[181]

118. Other than that, in paragraphs 456 to 458 the Tribunal just stated that the standard was linked to "good faith" and that "lack of due process" and "total lack of reasoning" would infringe the standard.[182]

119. TGH argues that "there was no need for the Tribunal to engage in any further analysis."[183] This is incorrect. The Tribunal's duty to carefully establish the content of the minimum standard of treatment clearly arises from the text of article 10.5 of the CAFTA-DR itself. Article 10.5 is an elaborate provision that reveals the drafters' and the State Parties' concern in how the standard is to be interpreted and applied. Article 10.5 reads as follows:

> **Minimum Standard of Treatment**
>
> 1. Each Party shall accord to covered investments treatment <u>in accordance with customary international law, including fair and equitable treatment</u> and full protection and security.
>
> 2. For greater certainty, <u>paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments</u>. The concepts of "<u>fair and equitable treatment</u>" and "full protection and security" <u>do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights</u>. The obligation in paragraph 1 to provide:
>
> (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

181 Award, para. 454.

182 *Ibid.*, paras. 456-458.

183 TGH's Counter-Memorial on Annulment, para. 81.

> (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.
>
> 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article. (Emphasis added).

120. Further, in Annex 10-B of the Treaty, the State Parties meticulously defined their understanding of the meaning of customary international law as follows:

> **Annex 10-B**
>
> **Customary International Law**
>
> The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Articles 10.5, 10.6, and Annex 10-C results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

121. Hence, the very provisions of the CAFTA-DR imposed a high burden on the Tribunal in interpreting and applying article 10.5. Further, the submissions of the Parties and of the non-disputing parties required this as well. Despite this, the Award is deficient in its treatment of international law. There was no analysis of the extensive case law cited by the Parties and no real examination of the difference between the international minimum standard and the rule of fair and equitable treatment, or the content of customary international law. The submissions of the non-disputing parties were not even mentioned in the merits sections of the Award.[184]

122. The Award also lacks any real application of international law to the facts of the case. TGH seeks to argue the contrary by referring to the instances in which the Award mentions concepts like "lack of due process," "willful disregard of the applicable

[184] Except for a single reference to one of those submissions in a footnote: Award, para. 621, footnote 513.

regulatory framework," "abuse of power" or "arbitrariness."[185] But the Tribunal did not examine the meaning or content of any of those concepts under international law, despite the fact that these concepts are essential to the Tribunal's conclusion that Guatemala breached the Treaty.[186]

123. In other words, the Tribunal never showed how Guatemala's alleged breach of the Regulatory Framework also resulted in a breach of international law. It simply conflated the concepts of a domestic and an international breach. The Tribunal first found a domestic law breach:

> The Arbitral Tribunal therefore concludes that Resolution No. 144-2008 is inconsistent with the regulatory framework.[187] (Emphasis added.)
>
> In the Arbitral Tribunal's view, in adopting Resolution No. 144–2008, […] the CNEE acted arbitrarily and in violation of fundamental principles of due process in regulatory matters.[188]
>
> In so doing, the CNEE in fact repudiated the two fundamental principles upon which the tariff review process regulatory framework is premised.[189] (Emphasis added.)
>
> The Arbitral Tribunal also considers that the regulator's decision to apply its own consultant's study does not comport with Article 98 of the RLGE.[190] (Emphasis added.)

124. Then the Tribunal automatically equated the breach of domestic law to a breach of international law without further discussion:

> In particular, would the Arbitral Tribunal find –as the Claimant avers– that the CNEE willfully disregarded the fundamental

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185 TGH's Counter-Memorial on Annulment, paras. 82-85. *See*, for example, Award, paras. 321, 465, 473, 489, 493, 664, 681.

186 Award, paras. 321, 489, 664, 681, 711.

187 *Ibid.*, para. 681.

188 *Ibid.*, para. 664.

189 *Ibid.*, para. 665.

190 *Ibid.*, para. 679. In complete opposition to this claim, the Constitutional Court stated that "proceedings conducted by both parties prior to the challenged authority deciding to dissolve the Expert Commission and based on a study carried out independently to dictate the challenged act, adhered to the provisions of Article 98 of the Regulations of the General Electricity Law," **Exhibit R-105**, p. 22 (emphasis added).

> principles of the regulatory framework in force at the time of the tariff review process in dispute, such a disregard would amount to a breach of international law.[191] (Emphasis added.)
>
> In the Arbitral Tribunal's view, both the regulatory framework and the minimum standard of treatment in international law obliged the CNEE to act in a manner that was consistent with the fundamental principles on the tariff review process in Guatemalan law.[192] (Emphasis added.)

125. Thus, the Tribunal failed to define the international law concepts relevant to its decision and to apply them to the facts of the case. There is a manifest lack of international law analysis in the Award. The Tribunal simply did not apply international law and equated a domestic law breach to a violation of international law.

126. TGH argues, in its Counter-Memorial on Annulment, that the Tribunal's international law analysis is at paragraph 587 of the Award, which reads:[193]

> Under the minimum standard, international law prohibits State officials from exercising their authority in an abusive, arbitrary or discriminatory manner. Article 10.5 CAFTA-DR also obliges the State to observe due process in administrative proceedings. A lack of reasons may be relevant to assess whether a given decision was arbitrary and whether there was lack of due process in administrative proceedings. As renowned authors have put it: "*if State officials can demonstrate that the decision was actually made in an objective and rational (i.e. reasoned) manner, they will defeat any claim made under the standard. If they cannot, the arbitrary conduct must be remedied.*" It is particularly so in the context of a tariff review process that is based on the parties' good faith cooperation, and in the context of which the parties had contemplated the intervention of a neutral body to resolve differences.

127. As can be seen, this passage simply provides a brief definition of the content of the minimum standard of treatment. It does not explain in any depth what arbitrariness or due

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191 *Ibid.*, para. 481.

192 *Ibid.*, para. 682.

193 TGH's Counter-Memorial on Annulment, para. 85.

process means under international law and certainly does not apply those standards to the facts. This is nowhere to be found in the Award.

128. The failure to properly examine international law, apply the proper law to the facts of the case, and conflate a regulatory domestic law breach with a breach of international law, constitutes another manifest excess of powers by the Tribunal. As the tribunal in *MINE v Guinea* found, "the parties' agreement on applicable law forms part of their arbitration agreement."[194] In the words of the *Sempra* annulment committee, the tribunal "made a fundamental error in identifying and applying the applicable law," and thus the Tribunal "failed to conduct its review on the basis [of] the applicable legal norm." Thus, "this failure constitutes an excess of powers within the meaning of the ICSID Convention."[195]

D. CONCLUSION ON THE TRIBUNAL'S MANIFEST EXCESS OF POWERS

129. The Tribunal manifestly exceeded its powers essentially due to: (i) its failure to examine and acknowledge that the dispute submitted by TGH was a purely domestic law dispute, identical to the one that had been resolved by the Constitutional Court, and did not raise genuine claims for breach of the Treaty; (ii) the reversal of the Constitutional Court's decisions; and (iii) by equating a domestic law breach to a supposed international law breach. The Tribunal's manifest excess of powers requires the annulment of the Award as a whole.

IV. THE AWARD FAILS TO STATE THE REASONS ON WHICH IT IS BASED

130. As explained in Guatemala's Memorial on Annulment,[196] the lack of reasoning of an ICSID award constitutes a ground for annulment under article 52(1)(e) of the ICSID Convention. Both a total absence of reasons,[197] as well as insufficient, inadequate or

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[194] *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4) Decision on Annulment, 14 December 1989, **Exhibit RL-47**, para. 5.03.

[195] *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16) Decision on Annulment, 29 June 2010, **Exhibit RL-71**, paras. 208-209.

[196] Guatemala's Memorial on Annulment, paras. 180-182.

[197] *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7) Decision on Annulment, 5 June 2007, **Exhibit RL-56**, para.126; *MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7) Decision on Annulment, 21 March 2007, **Exhibit RL-55**, paras. 50, 78; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary* (ICSID Case No. ARB/07/22) Decision on Annulment, 29 June 2012, **Exhibit RL-53**, para.17.

contradictory reasoning,[198] may constitute grounds for annulment under this provision. An award must allow the reader to understand how the tribunal went from the initial facts to its conclusions.[199] The reasoning in the Award at hand presents serious omissions and deficiencies and it therefore fails to state the reasons on which it is based.

A. FAILURE TO STATE REASONS FOR THE DECISION ON JURISDICTION

131. As explained above,[200] Guatemala filed an objection *ratione materiae* alleging that TGH's claim did not qualify as a claim under the Treaty in accordance with article 10.16.1(a)(i)(A) of the CAFTA-DR, which contains Guatemala's consent to arbitration.[201] The Tribunal dismissed this objection without reasoning: it did not examine the relevant provision of the CAFTA-DR and omitted completely the *prima facie* test that applies to this type of objections under international law. The Tribunal simply endorsed TGH's characterization of its claim, but that was not the reasoning required to explain the dismissal of Guatemala's objection to jurisdiction.

132. The first task of the Tribunal was to analyze the scope of consent, the written agreement to arbitrate applicable to the instant case, i.e., article 10.16.1(a)(i)(A) of the CAFTA-DR. The tribunal in *Iberdrola v Guatemala*[202] evaluated identical facts to the present case, and accepted Guatemala's same jurisdictional objection, explaining that "consent is the fundamental requirement for disputes between a Contracting State and an investor of another Contracting State to be submitted to arbitration under the ICSID Convention" and

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[198] *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4) Decision on Annulment, 14 December 1989, **Exhibit RL-47**, paras. 5.08-5.09; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on Annulment, 3 July 2002, **Exhibit RL-50**, paras. 64-65; *Wena Hotels Ltd v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Decision on Annulment, 5 February 2002, **Exhibit RL-64**, paras. 77-78; *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7) Decision on Annulment, 5 June 2007, **Exhibit RL-56**, para. 23; *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14) Decision on Annulment, 29 June 2005, **Exhibit RL-58**, para. 70; *Consortium RFCC v. Kingdom of Morocco* (ICSID Case No. ARB/00/6) Decision on Annulment, 18 January 2006, **Exhibit RL-78**, paras. 243, 260; *Patrick Mitchell v. The Democratic Republic of Congo,* (ICSID Cas e No. ARB/99/7) Decision on Annulment, 1 November 2006, **Exhibit RL-79**, paras. 21, 65.

[199] *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4) Decision on Annulment, 14 December 1989, **Exhibit RL-47**, para. 5.09.

[200] *See* Section III.A.1.

[201] *See* para. 54.

[202] *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, 17 August 2012, **Exhibit RL-32**.

"the Tribunal cannot limit itself to affirm that the State concerned, in this case the Republic of Guatemala, has consented to ICSID jurisdiction. Instead, it must verify the scope of such consent."[203]

133. The *Iberdrola* tribunal added:

> The consent of the Republic of Guatemala to the arbitration with Spanish investors is contained in the Treaty and, therefore, the matters in respect of which such consent was given are those that determine the competence of the Tribunal. It is then up to the latter, considering the matter of the dispute raised by the claimant investor, to establish whether or not this is covered in the consent to arbitration and, therefore, if it is a matter about which the Tribunal can decide. For this purpose, the instrument by which the Republic of Guatemala consented to arbitration, i.e. the Treaty, must be analyzed.[204] (Emphasis added.)

134. Here the Tribunal did nothing of the sort. It did not even consider it relevant to cite article 10.16.1(a)(i)(A) of the CAFTA-DR even once. This is how the Tribunal, from the outset of its section on jurisdiction, misjudged its task. Note that, to the contrary, the analysis was to be conducted with particular care. In the words of the *Iberdrola* tribunal again:

> As noted in previous decisions rendered by tribunals, jurisdictional analysis must be made carefully, in each particular case, taking into account the respective treaty or instrument of expression of consent and without any presumption for or against ICSID jurisdiction or the competence of the Tribunal.[205]

135. Thus, here the Tribunal should have carefully examined article 10.16.1(a)(i)(A) of the CAFTA-DR to determine if it had jurisdiction, but it did not do so. Contrary to TGH's contentions,[206] it is not irrelevant that the Tribunal omitted this analysis and superficially assumed that it was just required to check whether TGH had invoked the Treaty, which obviously was not the point. The point was to understand the importance of the scope of

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[203] *Ibid.*, paras. 293-294.

[204] *Ibid.*, para. 295.

[205] *Ibid.*, para. 303.

[206] TGH's Counter-Memorial on Annulment, para. 50.

consent under article 10.16.1(a)(i)(A) of the CAFTA-DR, and check the credibility of TGH's Treaty allegations as required by that provision.

136. However, the Tribunal failed to apply the *prima facie* test to assess Guatemala's objection to jurisdiction. When faced with an objection *ratione materiae* like the one raised here by Guatemala, a treaty tribunal must examine what the fundamental basis of the claim is.[207] In doing so, a tribunal must examine whether the facts of the case, if proven, may *prima facie* give rise to a genuinely international claim rather than merely be characterized as raising issues of local law.[208]

137. In the Award, the Tribunal devoted barely one page to this issue. It is worth noting how the Tribunal, in that page, makes no analysis of the facts at all. The Tribunal recites TGH's allegations and then jumps to the conclusion that those allegations are enough to demonstrate that the claim falls under the Treaty. The following are the relevant paragraphs of the Award (paragraph numbers included):

> 459. [T]he <u>Claimant alleges</u> that Guatemala's actions infringed "*a sense of fairness, equity and reasonableness*", and "*constitutes an unexpected and shocking repudiation of* [the LGE's] *policy's very purpose and goals or otherwise subverts a domestic law or policy for an ulterior motive*." […]
>
> 460. Essentially, the <u>Claimant alleges</u> that […] Guatemala repudiated the fundamental principles upon which the regulatory framework was based […].
>
> 461. The <u>Claimant also alleges</u> that the CNEE failed to act in good faith […].
>
> 462. <u>Such allegations</u> are supported by evidence that the Arbitral Tribunal will have to assess.
>
> 463. <u>According to the Claimant</u>, such behaviour does not only constitute a breach of the regulatory framework […] but also a breach of Respondent's international obligations under the CAFTA-DR.

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207 Memorial on Objections and Counter-Memorial, paras. 99-112; Rejoinder, paras. 31-37, 77-78; Respondent's Post-Hearing Brief, paras. 33-39, 67; Respondent's Post-Hearing Brief Reply, paras. 45-52.

208 Memorial on Objections and Counter-Memorial, paras. 3, 79-97, 100-106; Rejoinder, paras. 21, 29, 62-78; Respondent's Post-Hearing Brief, paras. 35-39, 59-60; Respondent's Post-Hearing Brief Reply, paras. 11-12, 14, 44-52.

> 464. The Arbitral Tribunal considers that the Claimant has made allegations that are such, if proved, as to establish a breach of Guatemala's obligations under the minimum standard, as defined in previous sections of this award.
>
> 465. There is in fact no doubt in the eyes of the Arbitral Tribunal that, if the Claimant proves that Guatemala acted arbitrarily and in complete and willful disregard of the applicable regulatory framework, or showed a complete lack of candor or good faith in the regulatory process, such behavior would constitute a breach of the minimum standard.[209] (Emphasis added.)

138. As can be seen, the Tribunal jumps from uncritically listing TGH's allegations and claims (paragraphs 459 to 463) to concluding that the *prima facie* test of jurisdiction *ratione materiae* is satisfied (paragraphs 464 and 465). There is nothing in between. There is no attempt to examine whether the facts supported, even *prima facie*, the allegations. There is simply no analysis. If a claimant can by-pass a limitation of jurisdiction *ratione materiae* just by making unilateral claims, assertions and allegations, then such limitation is deprived of any effect.

139. The analysis that the Tribunal should have conducted is well-known in the practice of arbitral tribunals. To determine if a dispute qualifies as an international claim, a tribunal must examine the fundamental basis of the claim, and cannot accept the formal legal characterization of the claim as presented by the claimant. For instance, in the words of the committee in *Duke v Peru*:

> [I]n applying the presumed facts to the legal question of jurisdiction, the tribunal must objectively characterise those facts in order to determine finally whether or not they fall within the scope of the parties' consent. In making this determination, the tribunal may not simply adopt the claimant's characterisation without examination.[210]

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[209] Award, paras. 459-465.

[210] *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru* (ICSID Case No. ARB/03/28) Decision on Annulment, 1 March 2011, **Exhibit RL-57**, para. 118.

140. As also correctly held in *UPS v Canada*: "a claimant party's mere assertion that a dispute is within the Tribunal's jurisdiction is not conclusive. It is the Tribunal that must decide."[211]

141. In the well-known holding in the *Oil Platforms* case, the International Court of Justice explained:

> Where the Court has to decide, on the basis of a treaty whose application and interpretation is contested, whether it has jurisdiction, that decision must be definitive […] It does not suffice, in the making of this definitive decision, for the Court to decide that it has heard claims relating to the various articles that are "arguable questions" or that are "bona fide questions of interpretation." […]
>
> […] The only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is to accept *pro tem* the facts as alleged by Iran to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes — that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them.[212] (Emphasis added.)

142. In the words of the tribunal in *Bayindir v Pakistan*, cited by TGH itself:[213]

> Accordingly, the Tribunal's first task is to determine the meaning and scope of the provisions which Bayindir invokes as conferring jurisdiction and to assess whether the facts alleged by Bayindir fall within those provisions or are capable, if proved, of constituting breaches of the obligations they refer to. In performing this task, the Tribunal will apply a *prima facie* standard, both to the determination of the meaning and scope of the BIT provisions and to the assessment whether the facts alleged may constitute breaches. If the result is affirmative, jurisdiction will be established, but the existence of

[211] *United Parcel Service of America, Inc. v. Canada* (UNCITRAL case) Decision on Jurisdiction, 22 November 2002, **Exhibit RL-4**, paras. 34-35, 37.

[212] *Case concerning Oil Platforms (Islamic Republic of Iran v. United States)* (1996 or Reports 803, General List No 90) Decision on Preliminary Objections, Separate Opinion of Judge Higgins, 12 December 1996, **Exhibit RL-136**, paras. 31-32.

[213] TGH's Counter-Memorial on Annulment, para. 53.

> breaches will remain to be litigated on the merits.[214] (Emphasis added.)

143. More recently, the tribunal in *Convial v Peru* held as follows:

> [T]he Tribunal agrees with the Claimant and with the tribunal in the *Iberdrola v. Guatemala* case, in the sense that an ICSID arbitral tribunal does not have jurisdiction to decide a dispute solely because one of the parties invokes an alleged violation of the investment treaty in question. Indeed, it is also necessary that the party who invokes such an international violation sufficiently prove that the alleged facts "*if proved, may constitute a violation of the Treaty*."[215]

144. No analysis of the facts or their objective characterization, or of the plausibility of the claims or sufficient foundation, is found in the Award. The Tribunal remained at the level of the characterization of the facts presented by TGH. This is the sort of approach that is considered inadmissible by international tribunals and the International Court of Justice in the first place, when dealing with an objection *ratione materiae* like the one presented hereby Guatemala.

145. Therefore, the Tribunal's decision on jurisdiction is incomprehensible. The fundamental basis of TGH's claim was the dispute over whether the CNEE breached the Regulatory Framework in the manner in which it applied it in the context of EEGSA's 2008 tariff review. The Tribunal described the dispute as follows:

> This dispute arose from the alleged violation by the *Comisión Nacional de Energía Eléctrica* (National Commission of Electric Energy) ("**CNEE**") of the Guatemalan regulatory

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[214] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Decision on Jurisdiction, 14 November 2005, **Exhibit RL-75**, para. 197.

[215] *Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru* (ICSID Case No. ARB/10/2) Final Award, 21 May 2013, **Exhibit RL-133**, para. 447. Unofficial English translation. For the original Spanish language, *see* para. 59. Unofficial English translation. In its original Spanish language it reads:

> [E]l Tribunal concuerda con la Demandada, y con el tribunal en el caso *Iberdrola c. Guatemala*, en el sentido que un tribunal arbitral CIADI no tiene competencia para dirimir una disputa por el mero hecho que una de las partes invoque una supuesta violación del Tratado de inversión en cuestión. En efecto, es necesario además que la parte que invoca tal violación internacional, fundamente suficientemente que los hechos alegados, "*de ser probados, podrían constituir una violación del Tratado*."

> framework for setting tariffs for distribution of energy by EEGSA, the electricity company in which the Claimant had an indirect share.[216]

146. A similar description is contained in other paragraphs of the Award:

> The present dispute essentially rests on an allegation of abuse of power by the regulator and disregard of the regulatory framework in the context of an administrative tariff review process.[217]
>
> The question here is whether the regulatory framework permitted the regulator, in the circumstances of the case, to disregard the distributor's study and to apply its own. The Parties are in disagreement in this regard.[218]

147. However, in order to explain how the CNEE's conduct, to which TGH objected, could give rise to a credible claim of breach of the Treaty and pass the test of jurisdiction, the Tribunal had to examine the fundamental basis of the claim and whether it satisfied the *prima facie* test. This analysis, however, is missing.

148. In short, the Tribunal rejected Guatemala's contention that TGH's claim fell outside of the Tribunal's jurisdiction without giving reasons as to how it reached that conclusion, in breach of the ICSID Convention. Following the statement by Professor Pierre Lalive already quoted above, the decision to assume jurisdiction when the latter was denied by Guatemala was "of such capital importance that it [should have been] fully reasoned and justified."[219] The Tribunal provided no reasoning for its decision on jurisdiction and that requires the annulment of the Award in its entirety.

B. FAILURE TO STATE REASONS REGARDING THE TEST OF APPLICABLE INTERNATIONAL LAW

149. As explained above and in Guatemala's Memorial on Annulment,[220] the Tribunal's analysis is also clearly insufficient with respect to the test of international law applicable

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216 Award, para. 79.

217 Award, para. 489.

218 Award, para. 534.

219 P Lalive, "On the Reasoning of International Awards" (2010) 1(1) Journal of International Dispute Settlement 55, **Exhibit RL-63**, p. 61. *See* para. 51.

220 *See* Section III.C. *See also* Guatemala's Memorial on Annulment, paras. 197-203.

to the merits of the dispute. The Tribunal's analysis of the content of the standard of fair and equitable treatment was limited to a brief statement that the standard "is infringed by conduct [that] […] is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety."[221] But the Tribunal failed to define the content of the standard beyond the sentence above, and failed to link the facts to that test. Thus, it is impossible for any objective reader of the Award to understand why or how Guatemala breached or did not breach the minimum standard of treatment.

150. Further, the Tribunal did not define the terms "arbitrariness" and "due process" under international law, which were crucial in its decision. The two concepts were repeated throughout the Award, as the following paragraphs illustrate:

> Teco states that Guatemala violated its obligation to accord its investment fair and equitable treatment when it […] acted arbitrarily, illegally, and in bad faith during the 2008 tariff review process.[222] (Emphasis added.)
>
> In the Arbitral Tribunal's view, in adopting Resolution No. 144-2008, […] the CNEE acted arbitrarily and in violation of fundamental principles of due process in regulatory matters.[223] (Emphasis added.)
>
> The Arbitral Tribunal therefore concludes that Resolution No. 144-2008 is inconsistent with the regulatory framework. […] [T]he CNEE acted arbitrarily and in breach of the administrative process established for the tariff review.[224] (Emphasis added.)
>
> The Arbitral Tribunal finds that such repudiation of the two fundamental regulatory principles applying to the tariff review process is arbitrary and breaches elementary standards of due process in administrative matters. Such behavior therefore breaches Guatemala's obligation to grant fair and equitable

221 Award, para. 454.

222 *Ibid.*, para. 321.

223 *Ibid.*, para. 664.

224 *Ibid.*, para. 681.

> treatment under Article 10.5 of CAFTA-DR.[225] (Emphasis added.)

151. But nowhere in the Award is there an examination of the terms "arbitrariness" or "due process" under international law. Nor did the Tribunal explain how the facts in this case could be characterized as being arbitrary or lacking in due process. Even the classic definition of arbitrariness by the International Court of Justice in the *ELSI* case,[226] repeatedly referred to by the Parties in their pleadings,[227] was omitted.

152. TGH argues in its Counter-Memorial that there was no need for the Tribunal to refer to the *ELSI* case on the definition of arbitrariness under international law because it "was not in dispute between the Parties."[228] This is incorrect. Guatemala argued in the Arbitration, on the basis of the *ELSI* case, that there is no arbitrariness when acts, even if censurable, have been performed on the basis of an effective legal system providing appropriate judicial remedies.[229] TGH disagreed.[230] Therefore, the Tribunal gave no relevance to the Parties' diverging opinions on this issue. The Tribunal did not refer to *ELSI*, and did not provide any other definition of the notion of arbitrariness under international law.

153. The lack of definition and analysis of the test applicable in international law permeates the entire Award. For example, the Tribunal does not define why the CNEE's behaviour, even if in breach of the Regulatory Framework (for example, due to Resolution 144-2008 not being sufficiently reasoned), was also arbitrary under international law.

154. The Tribunal simply concluded that there was arbitrariness and lack of due process, without defining the international standards of arbitrariness and due process, and thus

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225 *Ibid.*, para. 711.

226 *Elettronica Sicula S.p.A.* (*ELSI*) Judgment, ICJ Reports, 1989, p. 15, **Exhibit RL-1**, paras. 128-129.

227 Claimant's Memorial, para. 240; Memorial on Objections and Counter-Memorial, paras. 528, 533; Reply, para. 237; Rejoinder, paras. 165-166, 170; Claimant's Post-Hearing Brief, para. 41; Respondent's Post-Hearing Brief, paras. 274, 277; Claimant's Post-Hearing Brief Reply, para. 35; Respondent's Post-Hearing Brief Reply, para. 147.

228 TGH's Counter-Memorial on Annulment, para. 79.

229 Memorial on Objections and Counter-Memorial, para. 529; Rejoinder, para. 167; Respondent's Post-Hearing Brief, para. 275; Respondent's Post-Hearing Brief Reply, para. 147.

230 Reply, para. 237; Claimant's Post-Hearing Brief, para. 46; Claimant's Post-Hearing Brief Reply, para. 35.

without applying international law to the facts. Consequently, the Award does not give the reasons on which the Tribunal based its decision.

C. THE MANIFEST CONTRADICTION REGARDING THE POSSIBILITY OF REVIEWING THE DECISIONS OF THE CONSTITUTIONAL COURT

155. As stated above and in Guatemala's Memorial on Annulment,[231] the Constitutional Court ruled that the CNEE had not breached the Regulatory Framework.[232] In its decision of 18 November 2009[233] regarding specifically Resolution 144-2008,[234] the Constitutional Court concluded that the CNEE acted within the scope of its jurisdiction, i.e., that it "follow[ed] the process regulated by law,"[235] and thus the Court upheld the legality of the Resolution. This was confirmed in the Court's decision of 24 February 2010.[236]

156. The Tribunal acknowledged that the Constitutional Court's decision of 18 November 2009 resolved the dispute regarding Resolution 144-2008:

> [I]n a majority decision dated November 18, 2009, the Constitutional Court reversed the judgment of the second civil court of first instance, thus putting an end to the judicial proceedings against Resolution No. 144-2008.[237] (Emphasis added.)

157. Further, the Tribunal acknowledged in the Award that "[t]his Tribunal's task is not and cannot be to review the findings made by the courts of Guatemala under Guatemalan law."[238]

158. In plain contradiction with this, however, the Tribunal based its decision that the CNEE breached the Regulatory Framework by issuing Resolution 144-2008:

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231 *See* Section III.B. *See also* Guatemala's Memorial on Annulment, paras. 204-212.

232 *See* paras. 12, 30, 38.

233 Judgment of the Constitutional Court, 18 November 2009, **Exhibit R-105.**

234 CNEE Resolution 144-2008, 29 July 2008, **Exhibit R-95**.

235 Judgment of the Constitutional Court, 18 November 2009, **Exhibit R-105**, p. 31.

236 Judgment of the Constitutional Court, 24 February 2010, **Exhibit R-110**, pgs. 27-28, 32.

237 Award, para. 233.

238 *Ibid.*, para. 477 (emphasis added).

> <u>The Arbitral Tribunal therefore concludes that Resolution No. 144-2008 is inconsistent with the regulatory framework</u>. By rejecting the distributor's study […] with no regard and no reference to the conclusions of the Expert Commission, the CNEE acted arbitrarily and in breach of the administrative process established for the tariff review.[239] (Emphasis added.)
>
> In the Arbitral Tribunal's view, both the regulatory framework and the minimum standard of treatment in international law obliged the CNEE to act in a manner that was consistent with the fundamental principles on the tariff review process in Guatemalan law.[240]
>
> Based on those principles, the Arbitral Tribunal will now assess whether Resolution No. 144-2008 is arbitrary and constitutes a breach of the State's international obligations under the minimum standard of treatment.[241]

159. Thus, the Tribunal concluded that Resolution 144-2008 was contrary to the Regulatory Framework, although the Constitutional Court had found that it was consistent with such framework.

160. Hence the Award is plainly contradictory. No reader of the Award is able to understand how the CNEE can be held to have breached the Regulatory Framework and to have acted arbitrarily and without due process in issuing Resolution 144-2008, when such Resolution was upheld by the Constitutional Court as complying with the Regulations and Guatemalan law. Additionally, the Tribunal affirmed categorically that it would not second-guess the decisions of the Constitutional Court. This amounts to a plain contradiction, and thus to a failure to state reasons.

D. THE LACK OF REASONING AND MANIFEST CONTRADICTION REGARDING THE DECISION ON DAMAGES FOR HISTORICAL LOSSES

161. As explained in Guatemala's Memorial on Annulment and above,[242] the Tribunal found that the CNEE could reject the Bates White study, and was not bound to follow the Expert Commission's report, because neither were binding. However, in doing so, the

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239 *Ibid.*, para. 681.

240 *Ibid.*, para. 682.

241 *Ibid.*, para. 671.

242 *See* paras. 18-20, 27, 30, 39, 103. *See also* Guatemala's Memorial on Annulment, paras. 213-224.

CNEE should have provided reasons. This failure to provide reasons is the basis for the Award's finding that Guatemala breached the Treaty.

162. However, in its decision on historical damages, the Tribunal awarded compensation to TGH on the basis that the CNEE should have approved the Bates White study. The study, then, is considered binding. Indeed, the losses are calculated as the difference between the tariffs that would have resulted from the Bates White study (in its version of July 2008, which allegedly contained all the corrections recommended by the Expert Commission in its report) and the tariffs determined by the CNEE by applying the Sigla study. Thus, Guatemala is condemned to pay for an act −the CNEE's rejection of the Bates White study− which the Tribunal had not found to be in breach of the Regulatory Framework or the Treaty. This is clearly flawed and a plain contradiction. Any objective reader of the Award could not ultimately understand the damages award when confronted with the liability decision, which amounts to a failure by the Tribunal to state reasons. Thus, the section of the Award on historical damages should be annulled.

163. Let's recall briefly the merits decision of the Tribunal. The Tribunal dismissed most of TGH's claims in the Arbitration. It rejected the arguments of legitimate expectations and fundamental alterations of the Regulatory Framework.[243] It also dismissed the argument that the CNEE was unauthorized to dissolve the Expert Commission once it had issued its report;[244] and that the CNEE manipulated the terms of reference,[245] did not cooperate in the tariff review process,[246] and had breached its agreement with EEGSA to delegate power to the Expert Commission.[247] It also found that the CNEE did not try to unduly influence the Expert Commission[248] and had not engaged in any kind of reprisals against EEGSA.[249]

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[243] Award, paras. 618, 621, 624-638.

[244] *Ibid.*, paras. 653-657.

[245] *Ibid.*, paras. 639-643.

[246] *Ibid.*, para. 644.

[247] *Ibid.*, paras. 649, 650.

[248] *Ibid.*, paras. 645-652.

[249] *Ibid.*, paras. 712-715.

164. The Tribunal only took issue with the decision by the CNEE, once the Expert Commission had issued its report, to: (a) consider that it was not bound to implement the Expert Commission's report on the Bates White study; (b) reject the Bates White study including the study of 28 July 2008, which Bates White and EEGSA alleged contained all the corrections required by the Expert Commission's report; and (c) apply the Sigla study to fix the tariffs. As already explained repeatedly above,[250] all of these decisions were contained in CNEE Resolution 144-2008.

165. To be precise, the breach identified by the Tribunal did not concern the above decisions by the CNEE, as contained in Resolution 144-2008, but the fact that the CNEE did not provide reasons or motivation for such decisions.[251] Consistent with the Tribunal's conclusion that the Bates White study was not binding, and the report of the Expert Commission was not binding either but only advisory,[252] the Tribunal could not hold the CNEE liable for not having implemented the report, or for having rejected the Bates White study. Thus, the focus was on the insufficient motivation for such decisions.

166. Indeed, the entire liability section of the Award is premised on the CNEE's failure to provide reasons. Note the following paragraphs of the Award (paragraph numbers included and emphasis added):

> 457. […] In assessing whether there has been such a breach of due process, it is relevant that the Guatemalan administration entirely <u>failed to provide reasons for its decisions</u> or disregarded its own rules.
>
> 531. This is of course not to say that the distributor's study is binding upon the regulator. The regulator may disagree on certain parts of the study, in which case the Expert Commission would make a pronouncement which, although not in itself binding, the regulator would <u>in good faith have to consider with care</u>. What Article 98 excludes, however, is the regulator's discretion <u>to reject without reasons</u> the distributor's study and –as the case may be– the Expert Commission's pronouncements.

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[250] *See* paras. 11-13, 93-100.

[251] Award, paras. 545, 561-563, 576.

[252] *Ibid.*, paras. 565, 670.

545. Nor did the Constitutional Court, as will be seen in further sections of this award, decide whether, despite the Expert Commission's report not being binding, the CNEE nonetheless had the duty to consider it and provide reasons for its decision to disregard it. Such question will thus have to be decided by the Arbitral Tribunal.

561. This being said, the Arbitral Tribunal notes that the Constitutional Court was not called to decide whether, in spite of the Expert Commission's report having an "*informative*" value, the CNEE nevertheless had the obligation, under the regulatory framework, to give it serious consideration when establishing the tariff, or to give reasons for a decision to depart from it.

562. Obviously, the Constitutional Court cannot have intended to say that the CNEE could arbitrarily and without reasons disregard the Expert Commission's recommendations.

564. [T]he CNEE retains the exclusive power to fix the tariff […] This does not mean, however, that the Expert Commission's report should not have been given serious consideration by the CNEE. It does not mean, either, that the CNEE had unlimited discretion to depart from it without valid reasons.

565. The Arbitral Tribunal is of the view that, although the conclusions of the Expert Commission were not binding in the sense that it had no adjudicatory powers, the CNEE nevertheless had the duty, under the regulatory framework, to give them serious consideration and to provide valid reasons in case it decided to depart from them.

576. The second is that the conclusions of the Expert Commission were meant to have a greater authoritative value than those of a consultant that the regulator could have contracted for its own benefit. If the regulator had the discretion to disregard the Expert Commission's conclusions without providing any reasons, the regulatory framework would make no sense.

583. In view of the Arbitral Tribunal, the regulator could not decide to disregard the Expert Commission's pronouncements without providing any reason. The obligation to provide reasons derives from both the regulatory framework and from the international obligations of the State under the minimum standard.

584. Under the regulatory framework, it would be entirely inconsistent to provide for an expert determination mechanism while at the same time allowing the regulator to disregard the Expert Commission's conclusions without any reasons. Admitting that the regulator could ignore the Expert Commission's conclusions without providing any reason would be tantamount to assimilating the Expert Commission to a consultant contracted by the regulator in its own interest, which is clearly not what was intended by the LGE and the RLGE.

585. First, the Parties would not have devoted so much care and attention to the expert determination process if the regulator had the right to entirely ignore the conclusions of the Expert Commission without providing reasons. […]

586. In addition, the obligation for the regulator to provide reasons derives from the regulatory framework itself. […]

587. […] A lack of reasons may be relevant to assess whether a given decision was arbitrary and whether there was lack of due process in administrative proceedings. […]

588. In sum, the Arbitral Tribunal concludes that, although the conclusions of the Expert Commission were not technically binding upon the CNEE, the CNEE had the duty to seriously consider them and to provide its reasons in case it would decide to disregard them.

633. […] [If] the regulator would, after due consideration, have in good faith expressed reasons to disregard the report of the Expert Commission). The Arbitral Tribunal does not find it objectionable that, should the distributor fail to incorporate the corrections in such a situation, the regulator could decide to use its own independent study.

664. […] In the Arbitral Tribunal's view, in adopting Resolution No. 144-2008, in disregarding without providing reasons the Expert Commission's report, and in unilaterally imposing a tariff based on its own consultant's VAD calculation, the CNEE acted arbitrarily and in violation of fundamental principles of due process in regulatory matters.

670. The Arbitral Tribunal finally found that, although the findings of the Expert Commission are not technically binding in the sense that the Expert Commission has no adjudicatory powers, the regulator had the duty to give them serious

> consideration and to provide reasons in the case it decided to depart from them.
>
> 678. […] Resolution 144-2008 shows, however, that the […] CNEE failed without any reasons to take the Expert Commission's pronouncements into account.
>
> 683. The CNEE, once it had received the Expert Commission's report, should have analyzed it and taken its conclusions on board in establishing a tariff based on the Bates White VAD study, unless it had good reasons to consider that such conclusions were inconsistent with the regulatory framework, in which case it had the obligation to provide valid reasons to that effect. However, no such reasons were provided.
>
> 687. In the Arbitral Tribunal's view, in accepting that the Expert Commission would deliver its report the week of July 24, 2008 (or even by mid July 2008), the CNEE also had to accept that it would not be able to seriously consider the experts' conclusions, correct the Bates White VAD study accordingly, and publish the tariff by August 1, 2008.
>
> 698. As to Guatemala's view that the regulator was at liberty to fix the tariff based on a VAD study that did not reflect the Expert Commission's pronouncements, it is also incorrect. As a matter of fact, the regulatory framework only permits the CNEE to apply its own unilateral VAD study in two limited circumstances, which did not realize in the present case.
>
> 700. First of all, if the regulator disagreed with the Expert Commission's conclusions on the depreciation, it should in good faith have expressed such disagreement in a reasoned manner upon receipt of the Expert Commission's report.
>
> 708. The basis for the regulator's decision is that the consultant had failed to incorporate all the comments made by it in April 2008. Such basis is manifestly inconsistent with the regulatory framework and amounts to ignoring without reasons the pronouncements of the Expert Commission.

167. As is clear from the above paragraphs, the CNEE was entitled to reject the Bates White study and the Expert Commission's report. However, it could not do so without giving serious consideration to them and providing reasons for doing so. This is what the Tribunal found to be in breach of the Treaty.

168. The Tribunal then held that this breach had "caused" damages to TGH that Guatemala ought to compensate:

> As shall be seen in subsequent sections of this award, the Arbitral Tribunal finds that such breach has caused damages to the Claimant, in respect of which the Claimant is entitled to compensation.[253]

169. The "subsequent sections of this award" are those under Section IX of the Award headed "Damages." Thus, in those sections, in the very words of the Tribunal in the passage just quoted, the Tribunal would identify the damages caused by the CNEE's failure to provide reasons for rejecting the Bates White study and the Expert Commission's report, which was the breach ascertained in the liability section of the Award.

170. Yet in the "historical losses" section of the Award the Tribunal did not identify the damages caused by the CNEE's failure to provide reasons, but rather the damages resulting from a different conduct by the CNEE, as is clear from the following passage of the Award:

> The Arbitral Tribunal finds that Respondent's breach caused losses to the Claimant. […] The amount of such losses must be quantified […] on the basis of what the tariffs should have been had the CNEE complied with the regulatory framework. As said in § 728 above, such assessment is properly made on the basis of the Bates White's July 28, 2008 study. The Arbitral Tribunal has accepted the Claimant's views on the three issues that are in dispute in respect of that study (i.e. the VNR, the FRC and the CAPEX). As a consequence, the Arbitral Tribunal accepts the Claimant's claim for its historical losses of US$21,100,552.[254] (Emphasis added.)

171. Thus, the Tribunal quantified damages on the basis of the Bates White study, as if the CNEE had been bound to follow that study in determining the tariffs. However, this was not an obligation identified by the Tribunal in interpreting the Regulatory Framework and in holding that the CNEE had breached such Regulatory Framework. The obligation and breach identified related to the lack of reasoning of the CNEE's decision to reject the

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253 Award, para. 711.

254 *Ibid.*, para. 742.

Bates White study, not to such rejection *per se*. Thus, the Tribunal could never have awarded the losses allegedly caused by the CNEE's rejection of the Bates White study. This, in itself, was found to be lawful.

172. TGH argues that the Tribunal actually found that "there were no valid reasons" for the CNEE to reject the Bates White study and the Expert Commission's report,[255] and thus that study and report were binding on the CNEE. However, TGH bases this argument on paragraph 731 of the Award, which is in the section on damages, not on liability. That passage illustrates plainly the contradiction in the Award.

173. In the paragraph referred to by TGH the Tribunal held that "[t]he Respondent [did not] establish that the regulator would have had any valid reasons to disregard the pronouncements of the Expert Commission regarding the asset base" and that "[a]fter careful review of the evidence, the Arbitral Tribunal is not convinced that the Bates White 28 July study failed to incorporate the Expert Commission's pronouncements or that there is any reason to depart from such pronouncements."[256] Thus the Tribunal proceeded to award damages for historical losses on the basis that the Bates White study of July 2008 was binding upon the CNEE.

174. Hence, in paragraph 731 of the Award, the Tribunal changed the basis for Guatemala's liability. Arguing that there were no valid reasons to depart from the Bates White study and to disregard the pronouncements of the Expert Commission, Guatemala is made liable because the CNEE rejected the Bates White July 2008 study and the Expert Commission's report. This, however, is not the breach previously identified by the Tribunal in the liability section and for which, at the end of that section, it declared that "[a]s shall be seen in subsequent sections of this award, the Arbitral Tribunal finds that such breach has caused damages to the Claimant, in respect of which the Claimant is entitled to compensation."[257] The subsequent section on historical losses calculated damages for a different "breach," and thus is completely wrong.

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255 TGH's Counter-Memorial on Annulment, paras. 111-112.

256 Award, para. 731.

257 *Ibid.*, para. 711.

175. In other words, damages were calculated for an act −the rejection of the Bates White study and the Expert Commission's report− that the Tribunal had considered lawful in the merits section of the Award. This is the necessary consequence of the fact that the CNEE was blamed for not providing reasons for such rejections; had the rejections been illegal *per se* there would have been no point in grounding the liability decision on the failure to provide reasons. Further, the Tribunal made clear that the rejections were not unlawful because the Bates White study or the Expert Commission's report were not binding on the CNEE:

> This is of course not to say that the distributor's study is binding upon the regulator. The regulator may disagree on certain parts of the study, in which case the Expert Commission would make a pronouncement […] not in itself binding.[258] (Emphasis added.)
>
> [D]espite the Expert Commission's report not being binding, the CNEE nonetheless had the duty to consider it and provide reasons for its decision to disregard it.[259] (Emphasis added.)
>
> [I]n spite of the Expert Commission's report having an "*informative*" value, the CNEE nevertheless had the obligation, under the regulatory framework, to give it serious consideration when establishing the tariff, or to give reasons for a decision to depart from it.[260] (Emphasis added.)
>
> [T]he conclusions of the Expert Commission were not binding in the sense that it had no adjudicatory powers […].[261] (Emphasis added.)
>
> [T]he conclusions of the Expert Commission were not technically binding upon the CNEE […].[262] (Emphasis added.)
>
> [If] the regulator would, after due consideration, have in good faith expressed reasons to disregard the report of the Expert Commission) […], [t]he Arbitral Tribunal does not find it objectionable that, should the distributor fail to incorporate the

258 *Ibid.*, para. 531.

259 *Ibid.*, para. 545.

260 *Ibid.*, para. 561.

261 *Ibid.*, para. 565.

262 *Ibid.*, para. 588.

> corrections in such a situation, the regulator could decide to use its own independent study.[263] (Emphasis added.)
>
> The CNEE, once it had received the Expert Commission's report, should have analyzed it and taken its conclusions onboard in establishing a tariff based on the Bates White VAD study, unless it had good reasons to consider that such conclusions were inconsistent with the regulatory framework, in which case it had the obligation to provide valid reasons to that effect. However, no such reasons were provided.[264] (Emphasis added.)

176. In short, the CNEE was under no obligation to accept either the Expert Commission's report or the Bates White study, as revised in July 2008 allegedly to (unilaterally) incorporate the Expert Commission's report, i.e., the Bates White July 2008 Study. Had the CNEE devoted more consideration to the report of the Expert Commission, and had it provided sufficient reasons to depart from it and from the Bates White study, but still adopted the Sigla study, there would have been no breach of the Treaty. Thus, the Tribunal could not calculate damages on the assumption that the Expert Commission's report and the Bates White study were fully binding. However, the Tribunal did calculate damages in this way. This means that Guatemala must ultimately pay for consequences of conduct that was not found to be in breach of the Treaty.

177. A similar flaw was found to lead to annulment in *Pey Casado v Chile*. The tribunal accepted the claimant's damages calculation based on the claim for expropriation but it rejected such claim on the merits, finding liability only for breach of fair and equitable treatment.[265] In the committee's words:

> The Tribunal's use of the expropriation-based damage calculation is manifestly inconsistent with its decision a few paragraphs earlier that such an expropriation-based damage

263 *Ibid.*, para. 633.

264 *Ibid.*, para. 683.

265 *Victor Pey Casado and Foundation "Presidente Allende" v. Chile* (ICSID Case No. ARB/98/2) Decision on Annulment, 18 December 2012, **Exhibil RL-80,** para. 282.

> calculation is irrelevant and that all evidence and submissions relevant to such a calculation could not be considered.[266]

178. This is plainly applicable here: there is an obvious inconsistency between the decision on the merits of TGH's claim and the damages decision. Damages calculated on the basis that the CNEE could not reject the Bates White study or that it could not implement the Expert Commission's report could not be used to award damages for the fact that the CNEE did not provide reasons for such measures. There is an obvious difference between the two issues. In one scenario the CNEE is deemed to be bound to follow the Bates White study or the Expert Commission's report, in the other scenario the CNEE is not deemed to be bound by the study and the report, but only obliged to provide reasons for disregarding them. Damages cannot be the same in the two different scenarios.

179. The annulment committee in *MINE v Guinea* held that "the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the tribunal on points of fact and law."[267] In the Arbitration, no reader is able to understand why the Tribunal calculated damages on the basis of a tariff study, that of Bates White, which the CNEE was under no obligation to adopt for the purposes of setting the tariffs.

180. This patent contradiction and inconsistency amounts to a failure to state reasons requiring the annulment of the Tribunal's decision on historical damages.

E. FAILURE TO STATE REASONS FOR THE DECISION ON COSTS

181. As explained in Guatemala's Memorial on Annulment,[268] it is also impossible to understand the Tribunal's reasoning on costs.

182. Firstly, the Tribunal, without any explanation, held that TGH's costs were "justified" and "appropriate."[269] The Tribunal, however, made no attempt whatsoever to explain this conclusion.

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266 *Victor Pey Casado and Foundation "Presidente Allende" v. Chile* (ICSID Case No. ARB/98/2) Decision on Annulment, 18 December 2012, **Exhibil RL-80,** para. 285.

267 *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4) Decision on Annulment, 14 December 1989, **Exhibit RL-47**, para. 5.08

268 Guatemala's Memorial on Annulment, paras. 225-230.

269 Award, para. 775.

183. TGH argues that its costs of more than US$10 million were reasonable, and says that "costs were exacerbated by Guatemala's misconduct in the arbitration."[270] This is an extraordinary accusation, considering that Guatemala created no obstacle in the Arbitration and even consented not to bifurcate the issue of the Tribunal's jurisdiction. Guatemala was so cooperative that the proceedings lasted only 2.5 years from start to the post-hearing briefs, which is absolutely exceptional in today's investment treaty arbitration practice.

184. Secondly, the Tribunal argued that it would apply the principle that costs follow the event.[271] However, it ordered Guatemala to pay 75 per cent of TGH's costs. This is in contrast with the fact that TGH failed in most of its substantive claims, including those based on legitimate expectations, changes to the Regulatory Framework, reprisals against EEGSA's executives, and many others.[272] TGH prevailed only in one of such claims: that based on arbitrariness and lack of due process with respect to CNEE Resolution 144-2008. More importantly, on damages, TGH prevailed in less than 10 per cent of its claims. Indeed, it claimed US$243.6 million[273] and obtained US$21,100,552.[274] Further, in investment arbitration practice, it is unusual for one party to be ordered to pay the other party's costs.[275] In short, any proper application of the costs follow the event principle could never have led to ordering Guatemala to pay 75 per cent of TGH's costs.

185. TGH argues that tribunals have broad discretion on damages issues.[276] However, the point here is that there is no possible correlation between the principle of costs follow the event, which the Tribunal affirmed, and the amount of costs that Guatemala was ordered

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270 TGH's Counter-Memorial on Annulment, para. 126.

271 Award, para. 777.

272 *Ibid.*, *inter* alia, paras. 618, 621, 624-652, 657, 712-715.

273 Reply, para. 321; Claimant's Post-Hearing Brief, para. 203. Specifically, Claimant requested US$21.1 million as "[h]istorical losses", i.e., for the period between August 2008, when the new tariff was approved, and October 2010, when TGH sold its investment; and US$222.5 million for the period from that date until the expiration of the concession (*See* Award, paras. 335-336, 340).

274 Award, para. 780.

275 For example, *Tza Yap Shum v. Republic of Peru* (ICSID Case No. ARB/07/6) Award, July 7 2011, **Exhibit RL-81**, para. 296; *Bayview Irrigation District and others v. United Mexican States* (ICSID Case No. ARB(AF)/05/1) Award, June 19 2007, **Exhibit RL-82,** para. 125; *Alasdair Ross Anderson and others v. Republic of Costa Rica* (ICSID Case No. ARB(AF)/07/3) Award, May 19 2010, **Exhibit RL-83**, para. 62.

276 TGH's Counter-Memorial on Annulment, paras. 120-121, 125, 129.

to pay. Guatemala was ordered to pay in costs about 35 per cent of the total compensation awarded by the Tribunal, one of the highest costs awards ever found against a state in ICSID history.

186. In sum, the Tribunal's inexplicable costs decision should also be annulled as it fails to state the reasons on which it is based.

F. CONCLUSION ON THE FAILURE TO STATE REASONS

187. The Tribunal failed to state reasons for its decisions on jurisdiction and on the merits, and for plainly contradicting itself in relation to the Constitutional Court's decisions. This failure to state reasons requires the annulment of the totality of the Award. Further, the manner in which the Tribunal calculated TGH's historical losses also amounts to a failure to state reasons, requiring a partial annulment of the Award, specifically of the decision on historical damages. Finally, the decision on costs is also unmotivated and this requires the annulment of such decision.

V. THE TRIBUNAL SERIOUSLY DEPARTED FROM A FUNDAMENTAL RULE OF PROCEDURE

188. An award may be annulled on the ground that the tribunal seriously departed from a fundamental rule of procedure, such as the parties' right to be heard and to have equal opportunity to present their cases, including a tribunal's treatment of evidence.[277]

189. In the present case, the Tribunal committed a serious departure from a fundamental rule of procedure. It ignored evidence submitted by Guatemala on damages that, on the basis of the Tribunal's own reasoning, would have been crucial for the decision on damages for historical losses.

190. The Tribunal found that Guatemala's expert on electricity tariff reviews, Mr. Damonte, had not assessed in his report the tariff that would have applied had the CNEE adopted the Expert Commission's report to define the VAD. In the words of the Tribunal: "[b]ecause the May 2008 study as corrected by Mr. Damonte departs from the Expert

[277] *Togo Electricité and GDF-Suez Energie Services v. Republic of Togo* (ICSID Case No. ARB/06/7) Decision on Annulment, 16 September 2011, **Exhibit RL-87,** para. 59.

Commission's pronouncement on this important question, the Arbitral Tribunal cannot usefully refer to it as a basis for the but for scenario."[278]

191. However, this is incorrect. Mr. Damonte did present, in his expert reports, a scenario that considered the application of the Expert Commission's report to establish the tariff (including the much debated issue of the FRC, or "*factor de recuperación de capital*"). Such study is contained in Damonte's two expert reports and presented in Guatemala's Post-Hearing Brief.[279] In its Counter-Memorial on Annulment, TGH fails to acknowledge that Mr. Damonte provided such calculations and evidence.[280]

192. The Tribunal failed to consider Guatemala's arguments and expert evidence. Instead, the Tribunal directly applied TGH's calculations. By doing so it failed to consider the evidence before it and to accord due process of law to Guatemala, thus committing "a serious departure from a fundamental rule of procedure" under article 52(1)(d) of the ICSID Convention. This should result in the annulment of the historical damages portion of the Award.

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278 Award, para. 727.

279 Damonte, **Apendix RER-2**, para. 188 and Table 5; Direct examination of Mario Damonte, slide 16, Tr. (English), Day Six, 1414:6-1415:15; Respondent's Post-Hearing Brief, para. 194.

280 TGH's Counter-Memorial on Annulment, paras. 113-118.

VI. REQUEST FOR RELIEF

193. For all the reasons explained, Guatemala respectfully requests the Committee:

(a) To ANNUL the Award in its entirety or any part thereof in exercise of the Committee's power;

(b) To ORDER TGH to pay all costs of these annulment proceedings, including the costs of Guatemala's legal representation, with interest.

Respectfully submitted,

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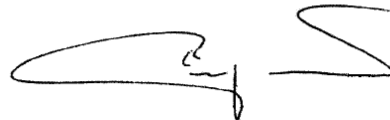
Alejandro Arenales



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